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IN THE SUPREME COURT OF THE UNITED STATES

**No.**

STATE OF IDAHO, Petitioner

vs.

DAVID ARTHUR, Respondent

---

## PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

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The petition of the State of Idaho respectfully shows to this Honorable Court:

### Opinion of the Court Below

The decision of the Supreme Court of the State of Idaho, which petitioner seeks to have this Honorable Court review, was filed on August 21, 1953, petition for rehearing was filed by the appellant, petitioner here, September 10, 1953, and was denied October 6, 1953. (R. 14, 29, 31)

The opinion is not yet officially reported, but will be found commencing at page 14 of the record. *See also* 261 P.2d 135, Adv. Sh., October 23, 1953.

Order to extend the time for filing this petition to February 1, 1954, was entered by Mr. Justice Douglas on December 28, 1953.

## Statement of the Matter Involved

Petitioner first summarizes the proceedings briefly, and then states the case in more detail.

In summary, a criminal complaint was filed which, as amended, in addition to the jurisdictional facts establishing the venue, alleges as facts the following:

(1) That this respondent, David Arthur, is a member of the Nez Perce Tribe of Indians;

(2) That he killed a deer at a time when such killing was forbidden by the state law of Idaho and the accompanying regulations of the State Fish and Game Commission;

(3) That the killing occurred "on the Nez Perce National Forest lands, State of Idaho," at a point approximately midway between Adams Camp and Toll Gate Lookout on the Adams Road."

The action originated in the Probate Court of Idaho County, Idaho, resulted in a conviction and went from there on appeal by this respondent to the District Court of the Tenth Judicial District of Idaho. In the District Court respondent's demurrer to said amended complaint was filed.

The demurrer

(1) admitted the facts alleged, this being the legal effect of a demurrer in the Idaho courts;

(2) asserted that they were "not sufficient to constitute a crime"; and further asserted

(3) that the said complaint contained "matter, which, if true, constitutes a legal bar to the action."

Thus, there being no issues of fact for trial, the only matter before that court consisted of questions of law.

The two pleadings just described and the District Court's order sustaining the demurrer and directing judgment for the defendant (respondent here) made and entered of record in writing, constituted the ultimately pertinent parts of the record placed before the Idaho Supreme Court on this petitioner's resulting appeal to that Court. The District Court's order for judgment was premised on the following findings:

(1) That the defendant "is a member of the Nez Perce Tribe of Indians".

(2) That the killing occurred "on the lands of the Nezperce National Forest, in the State of Idaho, and within the boundaries and limits of the reservation set aside for the Nez Perce Indians by the Treaty of June 11, 1855, between the United States and the Nez Perce Tribe, of which treaty the Court takes judicial notice."

The District Court having not only sustained the demurrer but also adjudged, pursuant to the admitted facts, that the defendant be discharged and the action dismissed, this petitioner, State of Idaho, appealed from said order and judgment to the Supreme Court of Idaho, there presenting to that Court the questions now presented to this Honorable Court by this petition.

Stated in somewhat more detail, with record referrals, a criminal complaint charging this respondent with having, on September 26, 1951 "at or near Grangeville in Idaho County, State of Idaho," killed a deer "out of season, contrary to Section 36-104, I.C. 1949 and the regulations of the Idaho fish and game department as adopted May 5, 1951," and further stating the locus of the killing as having been "approximately midway between Adams Camp and Toll Gate Lookout on the Adams Road," was filed in the Probate Court of Idaho County, on September 28, 1951. (R., 1) The statute is quoted herein

later and the said regulation appears as Appendix A.

An amended complaint, denominated "substituted complaint", was filed October 29, 1951, adding to the language of the original complaint the further description of the locus of the killing, "on the Nez Perce National Forest lands", and, following the name of the accused (this respondent) adding the descriptive phrase, "a member of the Nez Perce Tribe of Indians". Otherwise, the language of the charge remained unchanged. (R., 2)

The defendant plead "not guilty" to the amended complaint, a jury was waived, the case was tried with the Probate Judge sitting as a magistrate. The defendant was found guilty and judgment entered accordingly. An appeal to the District Court as aforesaid was taken on November 1, 1951. (R., 4, 7, 3)

(While not of major importance here, as we believe, but still part of the record in the transcript on appeal in the State Supreme Court, a certified copy of which accompanies this petition, the Prosecuting Attorney of Idaho County, after the appeal from the said Probate Court, filed an *information* in the District Court to which said appeal had been taken, on May 20, 1952, and on motion to strike the same, because on appeal the case stood for trial *de novo** on the amended, or "substituted", complaint, the information was treated as surplusage.) R., 6, 9.

The demurrer to the amended complaint was then filed, presented and argued, and on October 28, 1952, the District Court sustained the same and ordered and adjudged that

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* Idaho Code, Sec. 19-3942. TRIAL ON APPEAL
"The clerk of the district court must file the papers received, and enter the action on the calendar in its order with other criminal cases, and the same must be tried anew in the district court at the next term thereof, unless for good cause the same be continued."
State v. Ashby, 40 Idaho 1.

the complaint be dismissed and the defendant discharged. (R., 10, 11)

On appeal to the Idaho Supreme Court (R., 12) this petitioner assigned error in that (1) the District Court erred in sustaining the demurrer to said complaint; (2) erred in holding that the locus of the deer killing was within the boundaries and limits of the Nez Perce Reservation; (3) erred in adjudging that the action be dismissed and the defendant be discharged. Those assignments were made, as must be in Idaho, in the appellant's (this petitioner's) opening brief. After all briefs were duly filed and the case on appeal presented orally, that Court, on August 21, 1953, rendered and filed its decision affirming the order and judgment of said District Court. (R., 14) Petition for rehearing was filed by the State of Idaho, appellant in the Supreme Court, September 10, 1953, and was denied on October 6, 1953. (R., 29, 31) A certified copy of the Supreme Court's judgment was then remitted to the said District Court, on October 6, 1953,** (R., 31) and there duly entered. (R., 32)

Thus, the judgment became final and said decision controlling, in Idaho, on all questions presented by the record on said appeal, subject, however, to review by this Honorable Court as hereby sought.

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** Idaho Code, Sec. 19-2825. ENTRY AND REMITTITUR OF JUDGMENT.

"When the judgment of the appellate court is given, it must be entered in the minutes, and a certified copy of the entry forthwith remitted to the clerk of the court from which the appeal was taken."

Idaho Code, Sec. 19-2826. TERMINATION OF APPELATE JURISDICTION.

"After the certificate of the judgment has been remitted to the court below, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon, and all orders necessary to carry the judgment into effect must be made by the court to which the certificate is remitted."

## Basis of Jurisdiction

The Supreme Court of Idaho is the highest state court in which a decision could be had. *Idaho Constitution, Article V*; Idaho Code Vol. 1, p. 121.

The federal statute believed by petitioner to confer jurisdiction on this Court:

62 Stat. 989,
28 U.S.C., s 1257 (3).

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
> * * * *
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

(1) The statutes of Idaho the validity of which are drawn in question by respondent on the ground of their being repugnant to a treaty of the United States are: *Section* 36-104, *Idaho Code* (a part of *Title* 36, *Chapter* 1, *Vol.* 7 *of Idaho Code*) together with the regulations required of and duly made by the Fish and Game Commission and herein specified in the criminal complaint which originated this case, a certified copy of which regulations accompanies this petition and is reproduced so far as thought applicable here in Appendix A hereof; and *Sections* 36-103, 36-301 and 36-108(*b*), *Idaho Code*; those sections follow the creation of the State Fish and Game

Commission and, except *Section* 36-301, are a part of the Initiative Measure adopted at the general election of 1939.

"36-103. WILDLIFE PROPERTY OF STATE—PRESERVATION.—(a) All wildlife, including all wild animals, wild birds, and fish, within the state of Idaho, is hereby declared to be the property of the state of Idaho. It shall be preserved, protected, perpetuated, and managed. It shall be only captured or taken at such times or places, under such conditions, or by such means, or in such manner, as will preserve, protect, and perpetuate such wildlife, and provide for the citizens of this state, and as by law permitted to others, continued supplies of such wildlife for hunting, fishing, and trapping.

"(b) It shall be the authority, power and duty of said commission to administer and carry out the policy of the state in accordance with sections 36-102—36-106, 36-108—36-111."

"36-301. GAME ANIMALS.—Game animals shall include moose, elk, deer, caribou, mountain goat, mountain sheep, antelope, and bear."

"36-104. GENERAL POWERS AND DUTIES OF COMMISSION.—* * *

"2. Said commission shall have power and authority to determine in hearings to be held for that purpose, during what part of any particular year or years the supply of any particular species of game fish, game birds, or game and fur-bearing animals, or other wildlife, will be injuriously affected by depletion by permitting the same to be taken, and whenever the said commission shall find that in any particular portion or portions or the whole of the state of Idaho during any period of time the supply of any species of game

fish, game birds, or game and fur-bearing animals will be injuriously affected by depletion by the taking thereof, and shall give notice as hereinafter provided in sections 36-102—36-106, 36-108—36-111, then the season for taking any such game fish, game birds, or game or fur-bearing animals, or other wildlife, is hereby declared to be closed in conformity with such order and notice, and hunting, pursuing, killing, taking, angling for, or having in possession any such species shall be unlawful in any portion of the state, or such portion thereof as shall be named in such closing order, during any period of time, either within any year, or over any period of years fixed in such order and notice; or if it is determined by said commission after hearing and notice as aforesaid that the protection of any species of game fish, game birds, or game and fur-bearing animals, or other wildlife, will be served by either reducing or increasing the bag limit therefor, then the number of game fish, game birds, or game and fur-bearing animals, or other wildlife, which the said commission shall find as fact to constitute a reasonable number which may be taken without injuriously affecting by depletion or overcrowding the supply thereof, is hereby declared to be a reasonable number, and shall constitute the legal bag limit therefor and it shall be unlawful for any person to take or have in their possession more than such number as so found by said commission.

"Provided, that should the said commission find at any such hearing that the supply of any species of game fish, game birds, or game and fur-bearing animals, or other wildlife, is such that an open season may be permitted, or longer, or different opening and/or closing dates for existing open seasons for the taking thereof will not injuriously affect by depletion

or overcrowding the supply thereof, then such open season or such longer season, or such dates for the opening and/or closing of any existing season for the taking of any game fish, game birds, or game and fur-bearing animals, or other wildlife, as such commission shall find to be best for the protection thereof, is hereby declared to be and shall constitute the season therefore; and when said commission shall give notice in the manner hereinafter provided of such findings, then the season for taking any such game fish, game birds, game or fur-bearing animals, or other wildlife, is hereby declared to be as ordered by said sommission, and it shall be unlawful for any person to hunt, take, capture, trap, or fish for, or pursue any of such game fish, game birds, or game and fur-bearing animals, or other wildlife, except during such open seasons.

"For the purpose of determining the facts as to when the supply of any of the species named in this section will be injuriously affected by depletion by the taking thereof, or for the purpose of determining when an open season may be declared for the taking of game fish, game birds, or game and fur-bearing animals, or other wildlife, for which no open season now exists, said commission shall, at its regular quarterly meetings in April and July of each year, or on such other days as may be determined or appointed by said commission, at its office in the city of Boise, or elsewhere, meet for the purpose of hearing testimony and considering evidence pursuant to carrying out the provisions of this section, and whenever said commission at any such meeting find that the supply of any particular species of game fish, game birds, or game and fur-bearing animals, or other wildlife, is being , or will be, during any particular period of time, either within one year or over a period of years, in-

juriously affected by depletion by permitting the same to be taken, or if it should find a longer or different season, or different bag limit should be adopted for the better protection thereof, or if it finds that an open season may be declared without endangering the supply thereof, then it shall be the duty of said commission to make an order embodying its findings in respect thereto and specify the period of time, and portion of the state within which the taking of any species will injuriously affect, by depletion or overcrowding, the supply thereof, and where open seasons have been declared for specified game fish, game birds, or game and fur-bearing animals, or other wildlife, and thereupon at least ten days prior to taking effect of said order, shall give notice of its findings as aforesaid by posting a copy of such order in a conspicuous place in the court house of each county in the state where such order is to take effect, and it shall be the duty of the sheriff of each county to cause such notice to remain posted for a period of ten days, and said order shall be published as hereinafter provided."

"36-108. ORDERS AND REGULATIONS.—

* * *

"(b) Violations of Rules and Regulations. Any person violating any rule, regulation, or order, of the commission, adopted and published as herein set forth, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars ($25.00), nor more than three hundred dollars ($300.00) for each offense, or by imprisonment in the county jail for a period of not less than thirty (30) days, nor more than six (6) months, or by both such fine and imprisonment."

(2) The treaty is that between the United States and

the Nez Perce Indians, of June 11, 1855, ratified March 8, 1859, proclaimed April 29, 1859, and is found in

12 Stat. 957;
Kappler, Indian Affairs,
Laws and Treaties,
Vol. II, 702.

Articles 2 and 3 thereof are particularly important herein, though other related provisions are also of import. Those two articles, omitting the establishment of the reservation and the cession of all other lands to the United States, are worded thus:

"ARTICLE 2. * * *

"All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant, guarantying, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby

ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation, and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of equal value shall be furnished him as aforesaid.

"ARTICLE 3. And provided that, if necessary for the public convenience, roads may be run through the said reservation, and, on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways. The use of the Clear Water and other streams flowing through the reservation is also secured to citizens of the United States for rafting purposes, and as public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

(3) The statutes of the United States the validity of which in the instant case is called in question are here cited in chronological order, all dealing with National Forests:

16 U.S.C., Sec. 471; *derived from*
26 Stat. 1103,
34 Stat. 1271,
36 Stat, 847,
37 Stat. 497,
43 Stat. 655.

30 Stat. 34,
16 U.S.C., Sec. 475.

30 Stat. 36 and
36 Stat. 963,
16 U.S.C., Sec. 480.

33 Stat. 628,
16 U.S.C., Sec. 472.

35 Stat. 259,
16 U.S.C., Sec. 553.

48 Stat. 401 and
53 Stat. 1433,
16 U.S.C., Sec. 661.

48 Stat. 402, Ch. 55, Secs. 4, 5 and 6; 53 Stat. 1433;
54 Stat. 1232.
16 U.S.C., Secs. 664-666.

48 Stat. 400 and
53 Stat. 1433,
16 U.S.C., Sec. 694-694b.

*And see also*

36 Code of Federal Regulations, Parts 231 and 241,
Secs. 231.3(a) and (k), 241.1(a) and (b).

The above quoted Article 3 of the treaty also constitutes the basis of respondent's claim of invalidity of these federal statutes as applying to the facts of this case.

(4) The respondent has specially set up and claimed

a right, and a privilege, contrary to, and claims immunity from, the laws of both the State of Idaho and the United States above cited, his claim being based upon Article 3 of the treaty.

The federal statutes above cited summarize as follows:

The forest reserve law provides in sequence, commencing in 1891:

For the creation of National Forests by public proclamation, the land to be included in the resulting limits or boundaries of each Forest.

Require the Secretary of Agriculture to execute or cause to be executed all laws affecting the public lands reserved for and as National Forests.

Declare the purposes then in view in providing for the creation of the Forests.

*Section* 480, *U.S.C.* (1897) declares that the jurisdiction, both civil and criminal, over persons within National Forests shall not be affected or changed by reason of their existence, except in the matter of punishment of offenses against the United States therein; the intent and meaning of the provision being "that the state wherein any such National Forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the state." (1897 and 1911)

*Section* 553, *U. S. C.*, provides that officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways that are practicable, aid in the enforcement of the laws of the states or territories for the protection of fish and game, among other things. (1908)

*Section* 661, *U. S. C.*, authorizes the Secretary to provide

assistance and cooperation with the state and other agencies in increasing the supply of game and fish and in developing a nation-wide program of wild-life conservation and rehabilitation. (1934 and 1939)

*Section* 664, *U.S.C.*, makes further provision for better protection of fish and game, both on Indian lands and on the public domain, acting in cooperation with the state authority, cooperating with the states and others in enforcement of the statutes which accompany this cited statute. (1934, 1939 and 1940)

*Section* 694-694*b*, *U.S.C.*, are of the same general nature in the matter of conservation and propagation, and close with the provision, "that the present jurisdiction of the states shall not be altered or changed without the legislative approval of such states." (1934, 1939)

## Questions Presented By This Petition

The source of the questions is a triangular sort of structure. The treaty is the basic source of all questions, the state game laws are herein connected, necessarily, with that treaty and also with the federal laws creating Forest Reserves and providing for their administration and control; and those federal laws in turn make contact between the state laws and the treaty. All questions thus created are federal either wholly or in part, and are the questions presented to the state court by the assignments of error made on appeal thereto by this petitioner. The validity of the state laws in the case at bar is involved in all the questions, and the questions themselves so interlocked that it seems practically impossible to select some and eliminate others. The applicability of state laws to this and similar factual situations, and of the federal laws as well, now depends, in Idaho at least and, as we believe, in other

states, on the conclusions ultimately reached by this Honorable Court.

In an endeavor to state the questions as succinctly as possible, we state them in three groups, some having arisen in point of time upon the admission of Idaho as a state of the Union on July 3, 1890 (*Idaho Admission Act*, 26 *Stat.* 215, *Chapter* 656) and others upon the passage of federal statutes enacted subsequently to the date of the treaty of 1855, and all continuing to the present time.

## I

Putting aside, for the moment, the federal statutes, the following questions arise when the treaty and the Idaho state game laws are brought in contact and considered together:

*First.* Has the language of Article 3 of said treaty wholly immunized the Indian folk from state laws, standing alone, regulating the hunting of game animals, ever since the State of Idaho, on July 3, 1890, came into being as a separate local sovereignty?

This question relates more closely, we believe, to the ceded land dealt with in said treaty as becoming, because of such cession, "open and unclaimed", and other land ceded in later agreements hereinafter cited, although it is not limited to those ceded lands alone. Also, it encompasses the following more specific, but component, questions:

(1) Primarily, did the "privilege" continue to exempt them, as distinguished from other people, from procuring a license to hunt as required, following July 3, 1890, by the state law? And secondly, if one were to assume *arguendo* that it did, did that exemption cover any but "open

and unclaimed lands" existing in Idaho at the time of the deer killing on September 26, 1951, which created this case?

(2) Did that privilege when provided in 1855 exempt the Nez Perces from *regulatory* laws, as distinguished from the requirement of a license, fixing seasons, places during such seasons, and bag limits, for hunting, if and when such laws should be enacted at some future time by some local state sovereignty not then existent?

Also the following, not of first importance here, but still interlocked and integral, because the same treaty provision deals with their subject matter:

(3) Does that language now prevent the state from regulating "gathering roots and berries" as to kinds, time, places and quantities, on open, undisposed of public lands not now included in a Forest Reserve?

(4) Does it prevent the state from regulating the "pasturing of their horses and cattle" on such open and undisposed of public land, especially as to seasons, places and numbers of animals?

*Second.* Was it intended by the United States representatives when said treaty was drafted and signed that *all* public land then in the Territory of Washington (Idaho had not been heard of in 1855) vacant and open to settlement should be included in the phrase, "open and unclaimed land"?

*Third.* Was the "privilege of hunting" provided in said Article 3 then understood, and accordingly intended, to attach to lands therein denominated "open and unclaimed", *in perpetua*, which is to say, forever, or only so long as those lands should remain vacant and unclaimed by others?

## II

Turning now to the federal law heretofore summarized, which commenced on March 3, 1891 (26 *Stat.* 1103, *Ch.* 561, *Sec.* 24) and considering it in connection with the treaty, these questions are created:

*First.* Will not the "privilege", if declared existent as of today under the "hunting" clause above quoted, whatever be the resultant extent or limitation of its scope as concerns hunting by the Nez Perces, apply equally to "gathering roots and berries" and to "pasturing their horses and cattle" on the Nezperce National Forest?

*Second.* And will not the same apply equally to the tribes constituting the Yakima Nation in the State of Washington, under the identically worded Articles 2 and 3 of the Yakima Nation Treaty of June 9, 1855, entered into at the same "Long Council", ratified March 8, 1859 (12 *Stat.* 951, *II Kappler* 698) and to numerous tribes throughout the entire Northwest? (We cite such other treaties as among the reasons relied on for granting the writ hereby sought.)

*Third.* When, pursuant to and in accordance with the aforesaid federal laws enacted by Congress many years after the treaty, the Nezperce National Forest was established, did the public lands thereby withdrawn from entry or other disposition and included in and as the Forest Reserve remain and continue to be "open and unclaimed" within the meaning of that phrase as understood and used in the 1855 negotiations and the resulting treaty?

*Fourth.* Did the language of the treaty dealing with land therein described as being then, in 1855, "open and unclaimed", to-wit:

"together with the privilege of hunting, gathering

> roots and berries, and pasturing their horses and cattle upon open and unclaimed land",

continue to apply to land then "open and unclaimed" regardless of what specified disposition other than its inclusion in Forest Reserves the United States authorities might make of it at some future date?

## III

When those federal statutes are considered together with the state law, further questions present themselves:

*First.* Congress having enacted during the years from 1897 to 1934 that the regulatory hunting laws of the respective states within which Forest Reserves are located should be enforced on Forest Reserves by the state and federal authorities conjunctively, to-wit, in the Acts now found in the following:

> 16 U.S.C., Sections 480, 553 and 694b;

Did not such enactments in themselves make the appropriate fish and game laws of Idaho applicable to hunting on all lands constituting the Nezperce National Forest, as well as that constituting all other Forest Reserves within the state, whether such lands now are or are not, in legal contemplation, "open and unclaimed"?

*Second.* If it were assumed at this point that the said treaty provisions when considered alone would still, as of today, exempt the Nez Perce folk from provisions to the contrary in the state game laws, did not the Acts of Congress and the Forest Service regulations promulgated pursuant thereto nevertheless abrogate such treaty provisions insofar as they conflict with such state laws?

We have stated the above questions at the risk, perhaps, of seeming prolix, for which reason we wish in closing this

section of the petition to emphasize the fact that in each the interests and rights and the status in the premises, of all the people of Idaho are of the essence. This includes Idaho people of Indian blood in the same way and to the same extent as all other people: they are, since November 7, 1950, voters as well as citizens. (*Idaho Session Laws*, 1951, *p.* 654.) and to some extent the interests of the general public are affected as well. Also are included the interests and rights of the whole people of each of the other northwestern states. In the next section of this petition we refer this Court to numerous treaties instancing the correctness of the last statement.

### Reasons Relied On for Allowance of the Writ

This case is patently a "test case" created and carried on in an attempt to obtain a judicial confirmation of the special status and resulting special privileges presently claimed by the Nez Perce Indians and many others throughout the Nation. It is outstandingly of public importance that the questions to which it has given rise should be answered by this Court, otherwise there will and can be no uniformity of action throughout the various states and federal districts in which the local state and lower federal courts function. No such uniformity now exists, as we attempt to demonstrate *infra*. Federal questions are never set finally at rest until this Honorable Court has spoken.

As demonstrating the magnitude of importance of these questions, we note the following in addition to the treaty herein under direct scrutiny:

The Yakima Treaty of 1855, cited *ante*.
The Quinaielt Treaty of July 1, 1855,
Articles 2 and 3.
12 Stat. 971,
II Kappler 719.

Tribes of Middle Oregon, Treaty of June 25, 1855,
Article 1.
12 Stat. 963,
II Kappler 714.

The Flathead Treaty of July 16, 1855,
Articles 2 and 3.
12 Stat. 975,
II Kappler 722.

The Blackfeet Treaty of October 17, 1855,
Articles 3 and 4.
11 Stat. 657,
II Kappler 736.

Bannock and Eastern Shoshoni Treaty of July 3, 1868,
Articles 2 and 4.
15 Stat. 673,
II Kappler 1020.

We beg leave to call attention to this: The same provisions as regards hunting (and fishing as well) are in all the above cited treaties, except the Bannock and Eastern Shoshoni Treaty and the Treaty with the Blackfeet and other tribes that joined in that treaty. Those deal with hunting only. The provision in the Blackfeet Treaty (Article 3) for "a common hunting ground *for ninety-nine years*" (our emphasis) we believe sheds much light on what was *not* understood and intended by the hunting provision in the Nez Perce Treaty which gave rise to this case: the Nez Perce Tribe was also a party to the Blackfeet Treaty, entered into only five months later, and the ninety-nine years right would and does continue, whether the lands remained open and unclaimed or not.

We also call attention to the later Nez Perce Treaty of June 9, 1863, which ceded part of the 1855 reservation to

the United States, subject to the same provisions as in the first treaty. See Article 8 of the 1863 Treaty; and to the last Nez Perce Agreement, of 1893, Articles I, II and V, ceding practically all the remainder of the original Nez Perce Reservation except the small tracts allotted to the members of the tribe individually, and to the Act of Congress ratifying said last Agreement. These are found in

14 Stat. 647,
II Kappler 843.

28 Stat. 286, 331-332,
I Kappler 536-641.

Petitioner further states other reasons relied on:

1. The state court has decided a federal question which affects a very large number of people of all races in at least five states, which has not heretofore been presented to this Honorable Court, namely, the meaning and effect of the clause as it was explained, understood and then included in the Nez Perce Treaty in 1855, "the *privilege* of hunting, gathering roots and berries, and pasturing their horses and cattle on open and unclaimed land" (our emphasis) and the extent and limitations of its scope today under more recent federal laws and the later treaties, including the 1893 Agreement, and under the great change in conditions personal, social and governmental together with the change in status of what were then vacant, undisposed of lands, that has taken place during the years since 1855. We refer particularly, but not exclusively, to the following:

The "Dawes Act" of 1887,
24 Stat. 388, and the
Agreement of 1893,
28 Stat. 286, 331-332,
I Kappler 536-541.

In re Heff, 197 U.S. 488, 49 L.Ed. 848.
State v. Lott,
21 Idaho 646.

31 Stat. 179,
25 U.S.C., Sec. 421.

62 Stat. 757,
am. 63 Stat. 94,
18 U.S.C., Sec. 1151.

We also here refer to the federal statutes concerning Forest Reserves, their creation, administration and control, which we have heretofore cited and summarized, in the preceding section of this petition.

2. The state court has decided other federal questions of great importance in *haec verba*:

> "We are not here concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wild life; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only with reference to protecting the rights of the Indians which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden.
>
> "We hold that the rights reserved by the Nez Perce Indians in 1855, which have never passed from them, to hunt upon open and unclaimed land still exist unimpaired and that they are entitled to hunt at any time of the year in any of the lands ceded to the federal government though such lands are outside the boundary of their reservation. It necessarily follows

> that the judgment below should be and the same is hereby affirmed." (R., 28-293):

in that this (a) is in part premised on an assumption that because land was once a part of the 1855 Indian Reservation it continues to be subject to their present claims regardless of its cession and, having thereby become public land, its subsequent appropriation for both public and individual, private use; (b) is a holding that the present Nez Perce Indians may hunt whenever they please on lands ("any of the lands ceded to the federal government"—*supra*) long ago made open to individual entry by other people by federal law passed after 1855, and now owned in fee simple and occupied individually for personal, private use by a great number of United States citizens other than this respondent and the other members of his tribe. The language of the state court above quoted applies inescapably to *all* land ceded by the tribe, whether now in a Forest Reserve or not. In this connection the court quite apparently has held that the "reservation" still exists despite the "Dawes Act".

As to (a) above, we refer this court to the Dawes Act, the Agreement of 1893 and its ratification, both hereinabove cited, also in re Heff and State v. Lott, *supra*, and *Sol Louie v. United States*, 274 *Fed.* 47 (*C.C.A. 9th*); as to (b) above, we cite further:

> Article 2, Nez Perce Treaty of 1855 guarantying to all United States citizens the right to enter upon, occupy and use the lands which were not occupied or cultivated by the Indians *at that time*.

*cf.* Article 3 of said Treaty, limiting the "privilege of hunting" to "*open and unclaimed land!*" (Italics ours).

> St. Paul M. & M. Co. v. Donahue,
> 210 U.S. 21, 27-28; 52 L.Ed. 941, 944-945.

First Homestead Entry Act,
12 Stat. 392 (1862),
amended, 26 Stat. 1097. (1891)

Desert Land Act,
19 Stat. 377,
43 U.S.C., Sec. 311. (1877)

Timber and Stone Act,
20 Stat. 89,
43 U.S.C., Sec. 311. (1878)

31 Stat. 179,
25 U.S.C., Sec. 421. (1900)

(c) Proceeding, it includes, necessarily, a holding that said lands have always remained "open and unclaimed" in spite of later Federal Acts, and the resulting settlement on said lands, development thereof, and acquisition of fee simple title thereto by the present owners or their predecessors in interest. The court's very language characterizes land *then* "open and unclaimed" and ceded as such, as *still* "open and unclaimed" despite Article 2 quoted hereinbefore and immediately hereinafter; (d) nullifies, in inescapable effect, the express provision in Article 2 of said treaty, accompanying and conditioning the establishment of the reservation and the concomitant cession of all the remainder of the lands, namely:

> "and the said tribe agrees to remove to and settle upon the same *within one year after* the ratification of this treaty. *In the meantime* it shall be lawful for them to reside upon any ground not *in the actual claim and occupation* of citizens of the United States, and upon any ground claimed or occupied, *if with permission of the owner or claimant, guarantying, however, the right* to all citizens of the United States *to enter upon and occupy* as settlers *any lands* not actually oc-

cupied and cultivated by said Indians *at this time, and not included in the reservation above named.*" (Italics ours).

When this provision is placed alongside the closing phrase in Article 3 next following, "open and unclaimed land", we believe it furnishes in itself amply adequate proof of what was understood and accordingly intended to be the limitation, in point of time, of the hunting privilege on the lands then ceded to the United States for the use of its citizens, and all other vacant, unoccupied lands as well. The same is true of the Treaty of 1863 and the 1893 Agreement.

The holding of the state court last stated, (d) above, is not in accord with the decisions of this court, in that it disregards the obvious, palpable meaning and effect in this type of case of the related treaty provision last quoted above (Article 2); and, as a result, extends the meaning and effect of the closing clause of Article 3 to include that which it never did include, the element of perpetuity.

U. S. v. Choctaw Indians,
179 U. S. 494, 531-536,
45 L.Ed. 291, 305-307.

Also, the Columbia River fishing right cases from Washington on which the Idaho court has in very large measure relied lend no support to its decision for the obvious reason that the fishing rights clause of Article 3, "in common with the citizens of the Territory", is not a restrictive provision, but on the contrary; also, it is in no way connected with the "open and unclaimed land" condition by which the right of hunting was restricted: even the sentence structure of Article 3 in and of itself makes that plain. The *Tulee* case is here in point, but not as cited (R. 21) by the state court: it holds that the state may enforce its

*regulatory* laws, *even concerning fishing,* which by parallel reasoning is to the exact contrary of the Idaho court's conception of the hunting provision and its effect.

3. The state court's decision is further not in accord with former decisions of this Court in other cases of a nature quite similar to this, calling as they did for theconstruction of the same type of provisions in other Indian treaties and the determination of their scope and the limitations thereof, those provisions being therein relied on by the respective tribes as displacing and so preventing the enforcement of state fish and game laws of a regulatory nature; witness the following:

Tulee v. Washington,
315 U. S. 681, 684,
86 L.Ed. 1115, 1119 (1942).

U. S. v. Winans,
198 U.S. 371, 384,
49 L.Ed. 1089, 1093.

Kennedy v. Becker,
241 U.S. 556,
60 L.Ed. 1166.

Ward vs. Race Horse (Killing elk out of season)
163 U.S. 504,
41 L.Ed. 244.

4. The state court has erred in holding that existing applicable decisions of this Court have been, after rendered, "repudiated" and "rejected", which is to say, overruled, by this Court. (R., 23, 26)

5. In speaking of the holding of this Court in the *Tulee* case above cited, the state court has erroneously characterized the very plain and express language of that decision

as "dictum". (R., 26)

6. The decision is not in accord with decisions dealing with the status of public lands withdrawn and included within the Forest Reserves, especially the lower court's holding that they are still "open and unclaimed". Some of such former decisions are:

Light v. U. S.,
220 U. S. 523,
55 L.Ed. 570.

C. M. & St. P. Ry. Co. of
Idaho v. United States,
244 U. S. 351,
61 L.Ed. 1184,
*affirming* 218 Fed. 288 (C.C.A. 9th).

Cosmos Expl. Co. v. Gray
Eagle Oil Co.,
190 U. S. 301, 47 L.Ed. 1064.

Pacific Land and Impr. Co. v.
Ellwood Oil Co.,
190 U. S. 316,
47 L.Ed. 1073.

Nor with former decisions concerning the power of abrogation of treaties, Indian as well as others, in whole or in part, by Congressional enactment conflicting therewith. We believe the following to be fairly illustrative:

Lone Wolf v. Hitchcock,
187 U. S. 553,
47 L.Ed. 299.

Spalding v. Chandler,
160 U. S. 394,
40 L.Ed. 469.

Sanchez v. U. S.,
216 U. S. 167,
54 L.Ed. 432.

Cherokee Tobacco v. U. S.,
11 Wall. 616,
20 L.Ed. 227.

U. S. v. Lynde's Heirs,
11 Wall. 632,
20 L.Ed. 230.

7. The state court has decided erroneously another federal question of great importance in holding that when vacant, unoccupied lands are withdrawn from entry or other disposition and made a Forest Reserve subject to the laws of Congress providing for the use, purposes, administration and control thereof, they are nevertheless, and continue to be, "open and unclaimed" land in the same sense that the phrase was understood and used in describing among other lands the lands ceded to the United States as public lands in 1855 and in later agreements. Such federal question exists even if in a given instance one should attempt to ignore those laws.

8. The decision of the state court is in conflict with the general weight of authority, including the local decisions of other states and the decisions of the lower federal courts. In addition to the decisions of this Court cited *ante*, we refer to the following concerning regulatory fish and game laws:

State v. Wallahee, 255 Pac. 94. (Washington)

Dapson v. Daly, 153 N.E. 454. (Massachusetts)

State v. Bush, 263 N.W. 300 (Minnesota)

Bayside Fish and Flour Co. v. Gentry,
297 U. S. 422, 80 L.Ed. 772. (1936)
(Affirming the California Court)

Patsone v. Pennsylvania,
232 U. S. 138, 58 L.Ed. 539. (1914)
(Treaty with Italy)

As to the effect of the withdrawal of public lands, or purchased lands, and their inclusion in reserves for public purposes, pursuant to Congressional Acts, including the full and complete administration and control thereof, we refer to the following decisions:

Hunt v. United States, 278 U. S. 96, 73 L.Ed. 200. affirming 19 Fed. 28, 634. (1928)

Wilson v. Cook, 397 U. S. 474, 486-487,
902 L.Ed. 793, 803. (1946)

Ex parte Hyde, 194 Fed. 209, 213. (1904)

Shannon v. United States, (C.C.A. 9th) 160 Fed. 870, *affirming* 151 Fed. 863. (1908)

Griffin v. United States (C.C.A. 8th) 168 Fed. 2d. 457. (1948)

Van Lear v. Eisele, 126 Fed. 823. (1903)
*citing* 92 U. S. 698, 23 L.Ed. 690.

Together with

30 Stat. 36, Ch. 2, Sec. 1 (1897) and 36 Stat. 963, Ch. 186, Sec. 12 (1911); 16 U.S.C., Sec. 480.

35 Stat. 259, Ch. 192 (1908); 16 U.S.C., Sec. 553.

48 Stat. 401, Ch. 54 (1934) and 53 Stat. 1433 (1939); 16 U.S.C., Sec. 694b.

9. The Idaho court has held the federal statutes providing for National Forests and adopting and declaring state game laws to apply to the hunting and taking of game animals thereon, which includes the Nezperce National Forest, declaring the state's jurisdiction to administer and enforce those laws, and requiring the Forest Service authorities to assist in so doing to be "invalid" here and so of no force or effect. That question was presented twice. In connection with this, the Forest Service, in their own right and for the public good, certainly should have an authoritative announcement of the validity of those provisions, or of their invalidity, especially in Idaho.

10. The Idaho court has misconstrued the pertinent language dealing with hunting, both as used in the discussions leading to the treaty and in the treaty itself, in that it has held it to mean:

(1) That the public lands now long withdrawn from entry or other disposition by the United States and duly included in and as the Nezperce National Forest, are still "open and unclaimed" lands within the meaning of that descriptive phrase as first explained in the preliminary discussions, which we point out in the accompanying brief, and then placed in said treaty;

(2) That "the privilege of hunting" exists *unconditionally forever* regardless of the said withdrawal of that land and its inclusion in a National Forest Reserve pursuant to the provisions of the enabling Acts of Congress and the rules and regulations of the United States Forest Service made and promulgated as authorized and required by those Acts, which Acts are heretofore cited and summarized, and which rules and regulations thought to be pertinent in this case appear in Appendix B; and, indeed, regardless of what of like nature may be done in the future.

(3) That the language of that treaty now authorizes the Nez Perce Indians to hunt when, and where, they, each and all, may choose, also to take game animals in any number they choose, ("without limitation, restriction or burden") on any and all lands that were, on June 11, 1855, "open and unclaimed" as that expression was explained, understood and used at that time, and on other land ceded to the United States in later years. This follows of necessity from the language of the state court's decision above quoted. Moreover, if respondent and his fellow members of the tribe may do one thing, they surely may do the others.

(4) That the clause, "the privilege of hunting * * * on open and unclaimed land" was then used and understood as having, throughout all time to come, the same meaning and effect as the clause, "taking fish at all usual and accustomed places in common with the citizens of the Territory"; petitioner here respectfully points out that, while the places that had been and were at the date of said treaty "usual and accustomed" for fishing would necessarily continue their physical existence as "places", regardless of the settlement thereon by whites, the lands that were "open and unclaimed" on the same date, while also continuing to exist as "lands", would not because they could not, and were not expected to, remain "open and unclaimed" by other people; the second article of the treaty alone shows this last to have been well understood, to say nothing of the discussions in council that preceded the treaty.

11. The state court has rendered a decision on questions of great public importance in that they involve, almost *in toto*, the superior federal authority to administer and control *all* Forest Reserves (especially important here because affecting those in Idaho and the four other northwestern states) including the control of hunting thereon,

taking roots and berries therefrom and pasturing horses and cattle thereon.

12. The said questions are of further great public importance because they involve other treaties with other Indian tribes and their meaning and consequent effect, and also the rights, duties and powers, not only of Idaho, but of other state governments, to conserve and maintain an adequate supply of game and fish within their respective boundaries.

13. The questions are of further great public importance because they involve determination of the comparative status and resulting rights, or lack thereof, of all the other people of Idaho as well as the general public, in the matter of hunting and fishing in the State of Idaho and the resultant necessity of conservation and maintenance of fish and game therein, especially when such status and rights are compared with the superior status and rights now claimed by this respondent and through him by the numerous members of the Nez Perce tribe and many other voting citizens of Indian blood.

14. This Honorable Court should review the state court's decision, because as it now stands the respondent and all other members of the Nez Perce tribe may hunt at will on land long ago acquired individually and as privately owned property by other citizens of the State, by entry and purchase under the federal land laws, regardless of the existing individual and private rights and titles of the present owners and their predecessors in interest; if the Nezperce Forest lands were not "claimed", neither were the homesteads; those people constitute a large part of the citizenry of the State of Idaho; and also, the tribal Nez Perces have been declared privileged in such manner

that they are enabled to obstruct the efforts of the state to maintain and conserve an adequate supply of fish and game.

15. The state court has not recognized the power of Congress to abrogate treaties, and proceeding on that theory has refused to accept the express provisions of the Acts of Congress making the Idaho game laws applicable to the hunting of game animals on the Nez Perce National Forest. This refusal by the state court, when considered along with the Forest Reserve laws, especially, but not at all exclusively, the requirement that the Idaho game laws be enforced in National Forest mounts in all effect to a holding that the United States authorities were, by the Treaty of 1855, divested of power to provide for the administration and control of our Forest Reserves. (R., 29-31)

16. Because, as a matter of public knowledge and also of public record, many other Indian tribes, by other Indian treaties already cited herein, are concerned in the proper decision of the questions now presented to this Court, although they are not directly parties to the action; so also are other states of the Union and the people constituting he same.

## Prayer

Wherefore, your petitioner respectfully prays that this petition for a writ of certiorari be granted, that the order of this Court to that effect be entered, and that the Supreme Court of Idaho and counsel of record herein be duly notified of the granting of this petition; that this Honorable Court review the said decision of the Supreme Court of Idaho and that such decision be reversed; that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

STATE OF IDAHO, PETITIONER

ROBERT E. SMYLIE,
Attorney General of Idaho

J. R. SMEAD,
Assistant Attorney General of Idaho

ATTORNEYS FOR PETITIONER.

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STATE OF IDAHO,
Petitioner
VS.
DAVID ARTHUR

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The opinion of the Supreme Court of Idaho is not yet officially reported but is found at page 14 of the Record, also in 261 P.2d 135. The opinion of the State District Court is found at page 11 of the Record.

GROUNDS OF JURISDICTION

We believe jurisdiction is vested in this Honorable Court by 62 Stat. 989, 28 U.S.C., Sec. 1257 (3). The validity of the state regulatory statutes and regulations made pursuant thereto fixing the seasons for hunting deer and other game animals, the places where such hunting is permitted, and the bag limits were drawn in question by Respondent, also the validity of federal statutes calling for the enforcement of the state laws in the Nez Perce National Forest, and Respondent is claiming and has set up a right and a privilege contrary to both of said statutory provisions and claims immunity therefrom: all based upon the Nez Perce Indian Treaty of 1855. Also, certain Forest Service regulations based upon the said federal statutes and dealing in like manner with hunting, also the pasturing of livestock on the Forest Reserves, are drawn in question. The Record shows that the questions here presented were presented blow, and that the state court arrived at the judgment as a result of its decisions of those questions.

Furman v. Nichol, 8 Wall. 844, 19 L.Ed. 370, 376.

The state court has held all of such statutes and regula-

tions invalid in the instant case because of such treaty.

### Statement of the Case

Briefly, Respondent is a Nez Perce Tribal Indian, and on September 26, 1951, which date was not within the season permitted for hunting, killed a deer within the Nez Perce National Forest in Idaho. He was arrested, convicted in a magistrate's court, appealed to the district court, that court sustained a demurrer to the criminal complaint and ordered the case dismissed and the defendant discharged; on appeal by this Petitioner to the State Supreme Court that Court affirmed the order and judgment of the district court, and Petitioner now urges that this Honorable Court review that decision and that the same be, after such review, reversed. R. 14-31.

We believe that, aside from the case history, the really important matters of record are the amended complaint, the demurrer thereto, the district court's order and judgment, the Supreme Court's decision and judgment, the state's petition for a rehearing and the lower court's denial thereof. R. 2, 10, 11, 14-31.

The statutes here mentioned are cited and summarized in the petition to which this brief is attached, the regulations are found in Appendices A and B, Articles 2 and 3 of the treaty in Appendix C, and we will in our argument cite and quote from such of them as we believe specially and conclusively in point.

The treaty is found in

12 Stat. 957, II Kappler, Indian Affairs, 702.

### Assignments of Error

Petitioner relies upon and adopts as the specifications of error the Reasons Relied on for the Allowance of the

Writ appearing at pages 20 to 34 of the petition, which are adopted by reference and which, for convenience and brevity, are generally grouped as follows:

1.

(a) The court erred in holding that the Nez Perce Indians may now hunt without limitation or restriction upon "open and unclaimed land."

(b) In holding that they may so hunt on "any of the lands ceded" to the United States, including lands now and for many years owned in fee simple by other people for their personal, private use.

2.

(a) The court erred in holding that public lands which were open and unclaimed in 1855 are still open and unclaimed although now included in Forest Reserves or owned by individuals, pursuant to the federal land laws enacted years after the signing of the Treaty of 1855.

(b) In holding that the hunting clause of such treaty was understood and agreed to be *in perpetua* regardless of what disposition of the public lands might be made by federal authority.

3.

(a) The court erred in holding that the state laws and regulations, and the Forest Service laws and regulations, are invalid because of Article 3 of such treaty.

(b) In failing to observe and follow the provisions of Article 2, and the verbatim record of discussions and explanation of the treaty provisions which preceded and resulted in the drafting and signing of the treaty.

4.

(a) The court erred in deciding the federal questions before it, and so doing arrived at a judgment which is not in accord with existing decisions of this Court.

(b) In holding the express language of this Court in *Tulee v. Washington* to be "dictum."

(c) In holding that existing, applicable decisions of this court had been overruled.

(d) In failing to follow the decisions of this Court requiring the acceptance of the obvious, palpable meaning of treaty provisions.

5.

(a) The court erred in refusing to recognize the power of Congress to abrogate the provisions of the Nez Perce Treaty.

(b) In refusing to recognize the supreme and absolute power of Congress to provide how and by what rules of law hunting shall be regulated in National Forests.

(c) In deciding the status of land, once public, but now withdrawn and created a National Forest, to be other that theretofore announced by the decisions of this Court.

6.

The court erred in holding that it was "not concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interests of conserving wild life."

7.

The court erred in that the holdings referred to in

Assignments of Error 1, 2, 3, 4, 5 and 6 apply equally to the treaty clause concerning the gathering of roots and berries and the pasturing of horses and cattle.

## Argument

We will discuss the questions presented to and decided by the lower court in three groups, as they are stated in the petition for the writ, pages 15-17, 18-19, and 19-21. The first group arise from the joint consideration of the state statutes and the treaty, the second group from a like consideration of the federal statutes and the treaty, and the third from the juncture of the federal and state statutes. The assignments of error are, as nearly as may be, grouped accordingly. We have filed in connection with this petition and brief a certified copy of the State Fish and Game regulations referred to in the criminal complaint, and a certified photostatic copy of the original record of the discussions in the "Long Council" in Walla Walla Valley which preceded and culminated in the said Treaty of 1855; we have done so because, so far as we have been able to ascertain, there are no other authenticated records of those matters to which we can refer this Court.

### I

(Assignments 1, 2, 3 and 4)

To begin with, this petitioner did not, and does not, "rely principally" (R. 19) on *Ward v. Race Horse,* 163 *U.S.* 304, 41 *L.Ed.* 244, 16 *S. Ct.* 1086, as stated by the lower court. We did, and do, if a particular decision be selected as outstanding, rely upon *Tulee v. Washington* (1948) 315 *U.S.* 681, 86 *L.Ed.* 1115, 62 *S. Ct.* 862. While that case did not rest upon the hunting provision of the treaty, still so far as concerns the power of a state to enact and enforce purely regulatory laws of time and manner

of hunting is concerned we think this Court has made it plain that the state has the power of controlling the taking of game and thus conserving the supply thereof, just as it has the control and conservation of fish. We quote:

> "Relying upon its broad powers to conserve game and fish within its borders, however, the state asserts that itsright to regulate fishing may be exercised at places like the scene of the alleged offense which, although within the territory originally ceded by the Yakimas, is outside of their reservation. It argues that the treaty should not be construed as an impairment of this right and that since its license laws do not discriminate against the Indians, they do not conflict with the treaty. The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places', free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forcloses the state from charging the Indians a fee of the kind in question here."

It is well worth noting that the foregoing applies to game as well as fish, and in the matter of regulatory law as distinguished from the requirement of a license, this Court cited the *Race Horse* case, also *Geer v. Connecticut*, 161 *U. S.* 519, 40 *L.Ed.* 793, 16 *S. Ct.* 600; in addition *Kennedy v. Becker*, 241 *U.S.* 556, 60 *L.Ed.* 1166, 36 *S. Ct.* 705 and *United States v. Winans*, 198 *U.S.* 384, 49 *L. Ed.* 1093, 25 *S. Ct.* 662 are decisions of this Court definitely to the same effect. See also *State v. Wallahee* (*Wash.*) 255 *Pac.* 94. This, we submit, does away with the state court's

holding that the *Race Horse* case has not been followed, that it has been "repudiated" and "rejected". (R. 21, 23, 26) The same is true of *Kennedy v. Becker*. As to the decisions cited by the state court as having overruled those cases (R. 21-26) one reads them in vain to find in any one of them any mention of the *Race Horse* and *Kennedy-Becker* cases, except only the *Tulee* case wherein those cases, and the *Winans* case as well, are cited, *as precedents upon which the decision of this Honorable Court in the Tulee case is largely based.*

The *Winters* case held merely that when the Indian folk decided to follow a pastoral, agricultural vocation and accordingly accepted their allotments and conveyed the rest of their lands to the Government, all peoples in that territory as well as the Government representatives knew that the use of the river water for irrigation was indispensable to that end. There was no treaty provision to construe and apply. As everybody in the arid parts of this Union knows, water rights and land go hand in hand inseparably.

The *Dick* case is not authority as asserted by the lower court. (R. 19) It is based on the constitutional separably. The *Dick* case is not authority as asserted by the lower court. (R. 19) It is based on the constitutional provision empowering Congress to regulate commerce with the Indian tribes. Furthermore, the Dawes Act under which the Agreement was made was passed in 1887, before Idaho was a state. The Nez Perces were still wards of the Government in 1893, and the United States had exclusive jurisdiction of both the Nez Perces and their lands. This Court said exactly that, and so (statehood had occurred) did the Idaho Constitution. (R. 18) It was also twice pointed out that the liquor law which was agreed to continue was to do so for a limited period only, and

the decision was expressly limited to a consideration of the liquor law provision; this Court did not adjudge "how far, if at all, a treaty may permanently displace valid laws and regulations." Moreover, that law pertained to the Indians as persons; the lands were the limitation of the territory wherein the liquor prohibition applied. Finally (this we believe to be the only feature of the *Dick* decision pertinent here) the prohibitory law became such, not because of the Agreement of 1893, but because by ratifying and confirming the treaty and its provisions the Congress so ordained; the agreement itself so provided. In so doing, Congress attached the prohibitory condition to the locus in quo long before the village of Culdesac was heard of, while the lands were exclusively under federal control. That time has passed, the Indians title has "been extinguished by the United States," and the lands considered in the *Dick* case were in no way under federal control in 1951.

The *Seufert* case had nothing whatever to do with any question herein presented. It merely determind that "usual and accustomed places" applied appropriately to the south side of the Columbia River as well as to the north. We will endeavor *infra* to demonstrate the basic difference between "usual and accustomed places" and "open and unclaimed land" as the phrases were used in the Nez Perce Treaty of 1855; so fas as seasonal regulation of hunting and the like are concerned, we submit that the *Seufert* case is no authority for anything.

We think and submit that it follows that the state statutes regulating the taking of game animals are controlling and that the state has had the power so to control ever since it became a separate local sovereignty. We quote the relevant parts of those statutes, and the Fish and Game regulations are found in Appendix A:

36-103. (a) All wild life, including all wild animals, wild birds, and fish, within the state of Idaho, is hereby declared to be the property of the state of Idaho. It shall be preserved, protected, perpetuated, and managed. It shall be only captured or taken at such times or places, under such conditions, or by such means, or in such manner, as will preserve, protect, and perpetuate such wild life, and provide for the citizens of this state, and as by law permitted to others, continued supplies of such wild life for hunting, fishing, and trapping.

(b) It shall be the authority, power and duty of said commission to administer and carry out the policy of the state in accordance with sections 36-102—36-106,

36-301. Game animals shall include * * * deer * * *.

36-104 * * * * * * * *

Provided, that should the said commission find at any such hearing that the supply of any species of game fish, game birds, or game and fur-bearing animals, or other wild life, is such that an open season may be permitted, or longer, or different opening and/or closing dates for existing open seasons for the taking thereof will not injuriously affect by depletion or overcrowding the supply thereof, then such open season or such longer season, or such dates fo rthe opening and/or closing of any existing season for the taking of any game fish, game birds, or game and fur-bearing animals, or other wild life, as such commission shall find to be best for the protection thereof, is hereby declared to be and shall constitute the season therefor; and when said commission shall give notice in the manner hereinafter provided of such findings, then the season for taking any

such * * * game or fur-bearing animals, is hereby declared to be as ordered by said commission, and it shall be unlawful for any person to hunt, take, capture, trap, or fish for, or pursue any of such * * * game and fur-bearing animals * * except during such open seasons.

36-108 * * * * * *

(b) Violations of Rules and Regulations. Any person violating any rule, regulation, or order, of the commission, adopted and published as herein set forth, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine * * * * * * * or by imprisonment * * * * * or by both such fine and imprisonment.

Adverting to the *Tulee* case, *supra*, and to the lower court's holding that this Honorable Court therein indulged in dictum, we further quote this Court:

"Whenever a question fairly arises in the course of trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum."

U. P. R. Co. v. Mason
City & Ft. D. R. Co.,
199 U.S. 160,

50 L.Ed. 134;

and the following:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the case."

Elliott et al. v.
Piersol et al.,
1 Peters 340;

and cite the following:

Florida Cent. R. Co.
v. Shutte,
103 U.S. 118,
26 L.Ed. 327, 336.

New York Cent. & H. R. Co.
v. Price,
159 Fed. 330, 332.

Blair v. United States,
147 F.2d 840, 849.
Duncan v. Brown (N. Mex.),
139 Pac. 140, 142.

Bottomly v. Ford (Mont.),
157 P.2d 108, 112.
Ex Parte Sullivan (Nev.),
189 P.2d 338, 347.

Regarding the procuring of a license to hunt deer, we realize fully that this Respondent was not charged specifically with a violation of that statute: but sinve the lower court (R. 26-28) has made the license requirement a major subject of discussion, and its former holding that a Nez Perce Indian is not required to procure a fishing license in Idaho a major premise leading to the court's present decision and judgment, we think it is here a federal question of importance because it requires a construction of the federal treaty immediately considered, as well as others of like wording.

The fishing clause is

"the right of taking fish at all usual and accustomed places in common with citizens of the Territory"

while the hunting clause reads:

"the privilege of hunting * * * upon open and unclaimed land."

While undoubtedly no license to hunt was required in 1855, for the very sufficient reason that there was no law requiring it, it would seem plain enough that the privilege then existed only when exercised on open and unclaimed land. The language of the treaty is not uncertain nor yet ambiguous, and it was fully understood by the Nez Perces as well as the federal representatives at the Council, and the white settlers already there and those to come as well, that lands at that time vacant and unoccupied would not remain so. The record of the conferences in Council make that clear.

Referring to that record, Governor Stevens brought up the subject of white settlement at the outset and later it was gone into very plainly and forcibly by General Palmer. (See photostatic record, pages A23-A25; A37) Indeed, the entire record discloses that the basic purpose of the Council and the proposed treaty was to establish a tract exclusively for the Indians, and the obtaining of all other lands by the United States for public use, the latter principally for the whites who were already there and those that were sure to be there later.

On page A39 this appears:

"If we enter into a treaty now we can select a good country for you; but if we wait till the country is filled up with whites, where will we find such a place?"

Again, at pages A80 (the closing words) and A81 Governor Stevens said:

"But we want you to allow the white people to come and settle in the country anywhere outside the reser-

vation."

At page A86, speaking of the treaty which by that time had been drafted, Governor Stevens said:

> "The Nez Perces have their reservation as was shown them in council and in their paper everything was set down that was promised them. They all know what was said."

As to what the treaty means (See Appendix C), as to what had been promised the Nez Perces, we quote Governor Stevens, page A56:

> "You will be allowed to pasture your animals on lands not claimed or occupied by settlers, white men. You will be allowed to go on the roads to take your things to market, your horses and cattle. You will be allowed to go to the usual fishing places and fish in common with the whites, and to gather roots and berries and to kill game on lands not occupied by the whites; all this outside the reservation."

That language spoke of the future: it seems quite certain that, as said by this Court in the *Winans* case, page 381, "The contingency of the future ownership of the lands, therefore, was foreseen and provided for"—and as it was in Article 2 of the Treaty.

As stated in the petition preceding this brief (page 25) the right to hunt game was plainly limited to lands that should be vacant and unoccupied by the whites. The whole record of the Council proceedings makes this very apparent; the right of fishing attached to all the places which the Nez Perces had been accustomed to frequent for that purpose, and was definitely to be "in common with citizens". The language of the fishing clause is not susceptible to construction as establishing a time limit of the

privilege, whereas the language of the hunting clause is not subject to any other construction. Because a piece of land was open and unclaimed in 1855, that was not understood to mean that it would be "open and unclaimed" in 1951. Again the record of the Council proceedings makes that plain, and also discloses that interpreters under oath made it certain that all that was said in English or in the Nez Perce language was understood by the listeners. (Page A17)

We think it follows than any hunting of deer now done by the Nez Perces in Idaho without first procuring a license must occur on open and unclaimed land.

While not immediately included in the charge which was placed against this Respondent, we also submit that whatever the State of Idaho is empowered to do by way of purely regulatory law concerning hunting, also attaches to the gathering of roots and berries and the pasturing of the horses and cattle of the Nez Perce people on public land. we say this because the treaty itself deals with those activities together with hunting, in the same phrase. While these two questions have never been submitted to the Court, so far as we have been able to learn, the validity of the state "two-mile limit law" prohibiting the grazing of sheep on public land in the vicinity of privately-owned land was upheld by this Court, for which reason we believe that decision to be very much in point here.

Bacon v. Walker, 204 U.S. 311, 51 L.Ed. 499.

*See also*

Omaechevarria v. State of Idaho, 246 U.S. 343, 62 L.Ed. 762.

The foregoing applies equally to the state court's present

holding that the Nez Perces have the right "to hunt upon open and unclaimed land without limitation, restriction or burden" forever (R. 29) and leads to the conclusion that there is not and never was either intention or understanding that the hunting clause should remain in full force and effect perpetually. Further, this Court has held that the state has supreme control in conserving the supply of fish and game within its boundaries, that it may, by regulatory laws, preserve wild game if it pleases.

Bayside Fish and Flour Co. v. Gentry
297 U.S. 80 L.Ed. 772. (1936)

Patsone v. Pennsylvania,
232 U.S. 138, 58 L.Ed. 539. (1914)
(Treaty with Italy)

II

(Assignments 2(a), 3(a), 5)

Speaking now of the second group of questions stated in the Petition (pages 18-19), we come to the federal laws establishing and providing for the administration and control of our National Forests.

It would seem beyond argument that if the Respondent and his fellow tribes people may hunt game at will without regard to those federal laws and the regulations of the Forest Service made pursuant thereto (Appendix B) so also can they gather roots and berries of whatever sort and any amount they please at any time they please, and pasture their horses and cattle when and where and in whatever number they choose, on the Nezperce National Forest. Again, those activities are all included in the same few words of the 1855 Treaty. That they may not do any of these things except as permitted by the federal law

and regulations we believe quite evident. We cite the statutes especially relied upon, quoting their relevant parts and like parts of the regulations:

33 Stat. 628,
16 U.S.C. 472.

The Secretary of the Department of Agriculture shall execute or cause to be executed all laws affecting public lands reserved under the provisions of Section 471 of this Title * * * * * * after such lands have been so reserved * * * * *

30 Stat. 36,
36 Stat. 963;
16 U.S.C., Sec. 480.

The jurisdiction, both civil and criminal, over persons within National Forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United Staates therein is concerned; the intent and meaning of this provision being that the State wherein any such National Forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

16 U.S.C. 478.
30 Stat. 36,

* * * * Nor shall anything herein prohibit any persons from entering upon such National Forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such National Forests.

35 Stat. 259,
16 U.S.C., Sec. 553.

Officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways that are practicable, aid in the enforcement of the laws of the State or Territories with regard to stock, for the prevention and extinguishment of forest fires, and for the protection of fish and game, and with respect to National Forests, shall aid the other federal bureaus and departments on request from them, in the performance of the duties imposed on them by law.

16 U.S.C. 694b

(After making provisions for rules and regulations concerning fish and game refuges) Provided, that the present jurisdiction of the states shall not be altered or changed without the legislative approval of such states.

And see Secs. 661, 664 and 694-694a, 16 U.S.C., in the petition, pp. 14-15.

## Appendix B

Sec. 231.3 (a) Unless otherwise authorized by the Chief of the Forest Service, every person must submit an application and obtain a permit before his livestock can be allowed to graze on National Forest lands. The grazing regulations shall be considered a part of every permit.

Sec. 241.1 (a) Officials of the Forest Service will cooperate with State, County, and Federal officials in enforcement of all laws and regulations for the protection of wild life.

*See also*:

Sec. 241.1, (b), in Appendix B, providing for full power to enforce State laws and regulations "relating to fur-bearing and game animals, birds and fish" by officials of the Forest Service.

Not as specifically involved here, but as illustrating the public importance of this group of questions, we refer to the treaty with the numerous tibes constituting the "Yakima Nation" which was entered into at the same Long Council just two days before the signing of the Nez Perce Treaty, and to treaties of nearly the same time with many other tribes throughout the northwest:

12 Stat. 951,
II Kappler 698,
Articles 2 and 3.

12 Stat. 963,
II Kappler 714,
Article 1.

12 Stat. 971,
II Kappler 719,
Articles 2 and 3.

12 Stat. 975,
II Kappler 722,
Articles 2 and 3.

15 Stat. 673,
Articles 2 and 3.
II Kappler 1020,
Article 4.

This creates a situation which, if the Idaho decision be upheld, is of major importance and consequence to the United States Forest Service, as well as to all the peoples

of the five northwestern states other than the numerous people of Indian blood. In Idaho, when it is remembered that nearly three-fourths of its area is included in National Forests, the state court decision will wreak havoc on the efforts of the state's legislators and its Fish and Game Commission to conserve and maintain an adequate supply of wild game. National Forests being what nature made them and what the word encompasses, and wild game, as well as fish, being also a product of nature, it was inevitable that those Forest Reserves should be the habitat of the fish and game which belongs to the State of Idaho. The same result is in prospect in the matter of pasturing horses and cattle. It is common knowledge that Idaho is outstandingly a range stock state. If the present day Nez Perces, citizens and voters of Idaho and by no means the "unlettered" people which their 1855 forebears were, can take over the Forest Reserves without restriction or limit, it will be a dark day for the other citizens and voters of Idaho who are and for many years have been engaged in the business of rearing and ranging horses and cattle, and sheep as well.

The state court has held that the lands which were "open and unclaimed" in 1855, but which are now and for many years have been the Nezperce National Forest, by virtue of federal statutes and presidential proclamation, are still open and unclaimed. The decisions of this Court and of other courts negative that holding. In *Light v. United States*, 220 *U.S.* 523, 55 *L.Ed.* 570, the Court said that the Forest Reserves Acts were valid including the rules and regulations for the use, occupancy and preservation of the forests, citing *United States v. Grimraud*, 220 *U.S.* 506, 55 *L.Ed.* 563, that the Government" may deal with such lands precisely as a private individual may deal with his farming property," and that "The United States can prohibit absolutely or fix the terms on which its prop-

erty may be used. As it can withhold or reserve the land, it can do so indefinitely." The Court also cited *Article IV, Section* 3 of the *United States Constitution.* Of this the Court held that "Primarily, at least, it is a grant of power to the United States of control over its property." The Court also cited numerous other of its decisions in the same opinion.

The Ninth Circult Court of Appeals, in a Montana case, held that the creation of a Forest Reserve severs the territory from the public domain and appropriates it to public use so that it is no longer subject to an implied license to pasture livestock thereon. Forest Reserve lands are no longer "open". *Shannon v. U. S.,* 160 *Fed.* 870. Another federal court has held that all lands within a Forest Reserve belong to the United States for complete adminnstration and control. *Ex Parte Hyde* (*C. C. Cal.*) 194 *Fed.* 207, 213. That was in 1904. The Eighth Circuit Court of Appeals, in 1948, held that "The power of Congress over the lands of the United States wherever situated is exclusive"; further, that Congress has "power to control their occupancy and use to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them." The Court cited *Utah Power and Light Co. v. United States,* 234 *U.S.* 389, 404.

Griffin v. U. S.,
168 F.2d 957.

A like holding occurred concerning property purchased by the Government.

Van Leer v. Eisele,
126 Fed. 823.

Another outstanding decision of this Honorable Court,

dealing with a National Forest in Idaho, is *C. M. & St. P. Ry. Co. of Idaho v. U. S.*, 244 *U.S.* 351, 61 *L.Ed.* 1184.

If the former public lands which were withdrawn and set apart pursuant to federal law as the Nezperce National Forest were not thereby "claimed", and still continue to be, we confess that we are unable to understand what would constitute, in legal contemplation, a "claim". As we have suggested in the Petition for the Writ, if such land was not claimed, neither were the lands claimed, settled upon, and title thereto procured, by the white settlers about whom the Nez Perces and the federal represntatives devoted a considerable part of the discussions in the Council. We believe, and submit, that unclaimed land is that which is open to claim. If that be correct, we submit that the lands constituting the Nezperce National Forest are not now and never have been, open to claim by anyone. When Congress, in its plenary power, provides for the withdrawal of what is then public land and reserves it for a specified purpose and use to be carried out, providing that it shall be administered and controlled by the United States Government, we submit that land is no longer "open and unclaimed."

## III

(Assignments 5, also 2(b) and 3(a))

That Congress may provide for the enforcement of state game laws on a Forest Reserve we believe to be beyond argument. Such provision amounts to an adoption of the state game laws, including the regulations required and accordingly made pursuant thereto, and if we are correct in standing upon the decisions of this and other federal courts above cited, we further believe the Congressional Acts providing for their enforcement are, in such cases as

this, the supreme law of the land. It is true that the *Hunt* case from Arizona, 278*U.S.* 96, 73 *L.Ed.* 200, affirming 19 *F.2d* 634, held that the authorities of the Reserve could reduce the number of deer therein regardless of the laws of Arizona, but it is also true that the federal statutes and regulations here invoked were not relied on by the state authorities in either of the federal courts. We have found no mention of them. It is also true that the case was not in the same category by any means as the case at bar. We are not presuming to criticize the decision, in fact, while it may be sought out as being opposed to our contentions herein, we believe that when considered as a whole it is here in point only to the extent that it emphasizes the supreme power of Congress, from whom our federal law comes, to provide for the regulatory care, conservation and permitted taking of game in our National Forests as Congress may see fit. In the present case we think Congress has done precisely that, to-wit, has declared that the state game laws and regulations of Idaho shall be the regulatory law concerning deer and other wild game in the Nezperce National Forest, that the Forest Service shall assist the state officers in enforcing these laws, and that the jurisdiction of the state shall not be altered or changed unless the state legislators shall approve of so doing. In addition, the Forest Service authorities have provided by regulation that members of the Service personnel may be state game wardens with power to enforce the state game laws and regulations, as state officers. (Appendix B)

The foregoing concerning Forest Reserve Lands applies equally to lands which, pursuant to federal law enacted long after the 1855 Treaty, became open to individual entry by citizens and accordingly were by them claimed and eventually owned in fee simple for their private use. *See* Assignment 1 (b).

Referring to the federal enactments and the state game laws, when read and considered together, we submit that the federal requirement that the state game law be enforced on the National Forest lands conflicts with the construction of the Nez Perce Treaty which is relied on by Respondent; and for that very reason abrogates the treaty provision, even if such construction of the treaty were correct. If assumed *arguendo* that the treaty should be construed as Respondent contends and so construed would override the state law if it stood alone (which we do not assume except for the sake of the argument at this point) there can be no question that the provisions of Congressional Acts supersede any treaty with which they are in conflict. That is so long and well established that at this point we cite only the following:

Cherokee Tobacco v. U. S.,
11 Wall. 616, 20 L.Ed. 227.
Lone Wolf v. Hitchcock,
187 U.S. 553,
47 L.Ed. 299.

Patsone v. Pennsylvania,
232 U.S. 138.
58 L.Ed. 539.

We submit that whatever may once have been the effect and results of the hunting clause in the treaty, the state game laws are controlling in the Nezperce National Forest because Congress has so ordained. Pursuant to those provisions the administrative authority has provided for their enforcement by the regulations found in Appendix B, also in

36 CFR Part 241,
Sec. 241.1 (a) and (b).

This court tkes judicial notice of such regulations.

Caha v. U. S.,
152 U.S. 211, 222,
38 L.Ed. 1415, 1419.

U. S. v. Grimaud, *supra.*
Cassarello v. U. S.,
271 Fed. 486.

The rule is the same in Idaho courts:

McFall v. Arkoosh,
37 Idaho 243;

which is another reason why we assign error committed by the state court in this case. Such regulations have the force and effect of law. *Idem.*

Assignment 4

Applicable to all phases of this case because the Treaty of 1855 is involved in every phase, a court cannot disregard the obvious, palpable meaning of a treaty provision; not even if such meaning works an injustice to the Indians.

U. S. v. Choctaw Nation,
179 U.S. 494, 531, 536,
45 L.Ed. 291, 305-307.

We believe it quite evident that the state court has so disregarded the meaning of both the fishing and hunting provisions of the treaty here considered, especially when the verbatim record of the negotiations and discussions in council are read together with the treaty, as was done by the state court. R., 15-16, 23-24. We believe we have cited and quoted sufficiently from that council record to bear out our last statement. Moreover it seems em-

phatically in point to note here that the state court very evidently disregarded Article 2 of that treaty, which Article makes it clear and palpable that all parties to the treaty understood (especially when one bears in mind that it was exactly what the Council discussions called for) that all public lands outside the reservation would not continue, and were not expected, to remain vacant and unoccupied. The inevitable limitation on the hunting privilege, the time limit, was there and the disappearance of "open and unclaimed land" was approaching, in terms of historical time, rapidly. All who sat in the "Long Council" could not help knowing that, and consequently knew that exercise of the hunting privilege would not and could not be perpetual. It must cease when the places designated for its exercise were gone. Those places were long gone in 1951, and we submit that, whether speaking of public land disposed of under later laws to white settlers or that disposed of by its withdrawal from other uses and making it a Forest Reserve, the force and effect of the hunting clause of the treaty, for whatever it was once worth, dissipated at the same time. Indeed, when this case arose the Idaho Court had rendered a decision which verges very closely on this conclusion, and, here important, especially emphasized the Dawes Act of 1887 and the proceedings concerning the Nez Perces which had occurred thereunder.

State v. Lott,
21 Idaho 646.
24 Stat. 389.

The court also cited a decision of this court wherein it was held "that when the United States grants the privileges of citizenship to an Indian, gives him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside of the reach of police regulations on the part of Congress; that the

emancipation from federal coneral thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the state, and that this emancipation from federal control is not affected by the fact that the lands it has granted to the Indians are granted subject to a condition against alienation and encumbrance or the further fact that it guarantees to him an interest in tribal or other property," *In re Heff*, 197 *U. S.* 488, 49 *L.Ed.* 848 (1905).

The provisions of Article 2 apply to the Nez Perce Treaty of 1863.

14 Stat. 647,
II Kappler 843,
Art. 8.

And the condition contained in the Nez Perce Agreement of 1893 plainly did away with the basis for claiming that the lands then acquired would remain open and unclaimed.

28 Stat. 327,
I Kappler 536-541, 990.

It was that agreement which expressly provided that the provisions of 1855 should continue so far as they *were not inconsistent with the provisions therein.* When one observes that very definitely the reservation lands other than the tracts allotted individually were purchased by the Government for the express purpose of throwing them open to individual entry by the whites, additional emphasis is given to the original discussions, explanations and understandings arrived at in the Council of 1855. Far from supporting what the Idaho court conceived the 1893 Agreement to mean and accomplish (R., 17, 20) that agreement expressly recognized the controlling power of the

federal authority to dispose of public lands as it might see fit, regardless of what may have been the effect and results of Article 3 of the 1855 Treaty prior to the enactment and administration of the federal land laws which, in 1893, had been already enacted, and those which were enacted thereafter.

## CONCLUSION

WHEREFORE, your Petitioner respectfully prays that its Petition for a Writ of Certiorari be granted and the order of this Honorable Court to that effect be entered; that the Supreme Court of Idaho and counsel of record herein be duly notified of the granting of such Petition; that this Honorable Court review the decision of the Supreme Court of Idaho and that such decision be reversed.

STATE OF IDAHO
Petitioner

ROBERT E. SMYLIE
Attorney General of Idaho

J. R. SMEAD
Assistant Attorney General of Idaho
ATTORNEYS FOR PETITIONER.

## APPENDIX A

May 5, 1951

51-24 It was moved by McConnell that the following order be adopted:

The Fish and Game Commission of the State of Idaho, having given notice and held hearings, and having made due and thorough investigation, and received recommendations from conservation officers of the department and other competent persons, finds that the following seasons,

bag limits and other regulations governing the taking of big game and fur-bearing animals in the State of Idaho are necessary, and that certain changes in seasons, bag limits and other regulations should be made in the interest of conservation and wise use of the wildlife resources of the State of Idaho;

Therefore, it is ordered that the following seasons and regulations for the taking of big game and fur-bearing animals in the State of Idaho, based upon the findings of fact by the Idaho Fish and Game Commission, are hereby declared for the period commencing May 10, 1951, and until further order of the Commission; and the Director of the Fish and Game Department is ordered to give notice of and cause to have printed for public information these regulations and all changes thereof as required by law; and it is further ordered that it shall be unlawful to take big game or fur-bearing animals in the State of Idaho except as herein provided:

***********

## DEER

Clearwater County north of the Clearwater River and east of the North Fork of the Clearwater River and east of the Little North Fork of the Clearwater River; all of Idaho County EXCEPT that part of Idaho County lying south of the main Salmon River and east of the Little Salmon River—OCTOBER 1 to OCTOBER 31.

Adams, Washington and those portions of Valley, Payette, Gem, Ada, Boise, Elmore and Idaho Counties within the following described boundary: starting at Boise, thence following the Boise River east to its junction with the South Fork of the Boise River, thence up the South Fork of the Boise River to the west boundary of the Soldier

Mountain Game Preserve, thence north and east along the Soldier Mountain Game Preserve boundary between the Middle Fork and South Fork of the Boise River watershed, thence east and north along said divide intersecting the county lines of Elmore, Camas and Blaine Counties and continuing north along the divide between the Middle Fork of the Boise River watershed and the Salmon River watershed to Snowyside Peak, thence continuing northwest along the divide between the Payette and Salmon River watersheds and the Boise-Custer County line to the Valley County line, thence north along the Valley-Custer County line to the Middle Fork of the Salmon River, thence northward down the Middle Fork of the Salmon River to Big Creek, thence west up Big Creek to the Warren-Big Creek road, thence west along the Big Creek-Warren road to the South Fork of the Salmon River, thence down the South Fork of the Salmon River to the main Salmon River, thence down the main Salmon River to Riggins, thence south on Highway 95 to the Adams-Idaho County line near Pollock, thence due west along the Idaho-Adams County line to Snake River, thence south up Snake River to the Payette, thence up the Payette River to the Montour Bridge, thence north along the Montour-Sweet-Ola-High Valley-Smiths Ferry road to Smiths Ferry, thence down the North Fork of the Payette River south to Horseshoe Bend, thence south following the Cartwright-Shafer Creek road from Horseshoe Bend to Boise, the point of beginning, EXCEPT the South Fork of the Payette River Game Preserve in Boise County—OCTOBER 5 to OCTOBER 31.

## Appendix B

### Forest Service Grazing Regulations, 36 CFR., Part 231.

"Sec. 231.3 Applications and Permits. (a) Unless otherwise authorized by the Chief of the Forest Service,

every person must submit an application and obtain a permit before his livestock can be allowed to graze on national-forest lands. The grazing regulations shall be considered a part of every permit."

"Sec. 231.4 * * * * *

"(k) Persons who are full citizens of the United States shall be given preference in the use of national-forest ranges over other persons."

FISHING AND HUNTING REGULATIONS, 36 CFR, PART 241.

"Sec. 241.1 COOPERATION IN WILDLIFE PROTECTION. (a) Officials of the Forest Service will cooperate with State, county, and Federal officials in the enforcement of all laws and regulations for the protection of wildlife.

"(b) Officials of the Forest Service who have been, or hereafter may be, lawfully appointed deputy game wardens under the laws of any State, will serve in such capacity with full power to enforce the State laws and regulations relating to fur-bearing and game animals, birds, and fish. Such officials will serve as State deputy game wardens without additional pay, except that they may accept the usual fees allowed by the respective States for issuing hunting and fishing licenses. All officials of the Forest Service are prohibited from accepting bounties, rewards, or parts of fines offered by any person, corporation or State for aid rendered in the enforcement of any Federal or State law relating to fur-bearing and game animals, birds, and fish."

## APPENDIX C

Article 2. * * * * * *

"All which tract shall be set apart, and, so far as neces-

sary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant, guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided that any substantial improvement heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation, and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of equal value shall be furnished him as aforesaid.

"Article 3. And provided that, if necessary for the public convenience, roads may be run through the said reservation, and, on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them, as also the right, in common with citizens of the United States, to travel upon all public highways. The use of the Clear Water and other streams flowing through the reservation is also secured to citizens

of the United Staates for rafting purposes, and as public highways.

"The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land."

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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No. 552

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STATE OF IDAHO, *Petitioner*,

vs.

DAVID ARTHUR

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho**

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## BRIEF FOR RESPONDENT

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### OPINION BELOW

The opinion of the Supreme Court of the State of Idaho (R. 15-29) has not as yet been reported officially. It is reported unofficially in 261 P. 2nd 135, Adv. Sh., October 23, 1953.

### JURISDICTION

The judgment of the Supreme Court of Idaho was entered on August 21, 1953. A petition for rehearing was filed on September 10, 1953 and was denied October 6, 1953. On December 28, 1953 Mr. Justice Douglas entered an

order extending the time for filing a petition for a writ of certiorari to February 1, 1954. The petition was filed on January 28, 1954. The jurisdiction of this court has been invoked under 28 U.S.C. Sec. 1257(3).

## QUESTION PRESENTED

The legal question presented has been stated succinctly by the State Court (R. 15):

"[W]hether the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855, which lands are now a part of the Nez Perce National Forest, during the closed season in disregard of the statutory laws of Idaho."

## STATUTES AND TREATIES INVOLVED

The Nez Perce Treaties and Agreement in question here are the Treaty of 1855 (12 Stat. 957), the Treaty of 1863 (14 Stat. 647), and the Agreement of 1893 (28 Stat. 331). The state statutes under consideration, Idaho Code Secs. 36-103, 36-104, 36-108, and 36-301 appear in Petitioner's Brief, pp. 7-10. The relevant regulations issued thereunder appear in Appendix A to Petitioner's Brief, pp. 64-66.

## STATEMENT OF THE CASE

The respondent, David Arthur, is a member of the Nez Perce Tribe of Indians. On September 26, 1951 he killed a deer on the Nez Perce National Forest, in Idaho County, Idaho, outside the boundaries of the present reservation, but within the area ceded by the Nez Perce Tribe of Indians under Article I of the Treaty of 1855, 12 Stat. 957. He was thereafter charged with having killed said deer out of season, in violation of the conservation laws of the State of Idaho and the regulations issued thereunder (R. 2). Respondent contended that in view of his rights under the Nez Perce Treaty of 1855, the State

conservation law in question was inapplicable to him under the circumstances of the case.

Respondent was tried in the Probate Court of Idaho County, Idaho and was found guilty. On October 29, 1951 judgment was entered against him in the sum of $100 (R. 8). On appeal to the District Court of the Tenth Judicial District of the State of Idaho the State's complaint was ordered dismissed on the ground that the facts charged did not constitute a crime (R. 11-12). The Supreme Court of the State of Idaho affirmed that decision in a unanimous opinion, holding the State conservation laws and regulations inapplicable to the facts of the case since respondent had acted within his rights under the Nez Perce Treaty of 1855 (R. 15-29).

## SUMMARY OF ARGUMENT

The crucial holding of the Supreme Court of Idaho is that the Nez Perces' right to hunt upon open and unclaimed land within the area ceded by them to the Federal Government, reservd to them by the Treaty of 1855, 12 Stat. 957, has never passed from them and may be exercised today on the Nez Perce National Forest. That holding is eminently correct.

In arriving at its holding, the Supreme Court of Idaho had to deal with two basic questions. In the first place it had to define the right reserved to the Indians by the Treaty of 1855. Beyond that, it had to examine whether subsequent treaties or enactments extinguished the right or caused it to expire.

## ARGUMENT

### I. The State Court Correctly Defined the Hunting Rights Reserved to the Nez Perce Indians.

The reservation of hunting rights to members of the Nez Perce Tribe of Indians is contained in Article III of the Treaty of 1855, which provides:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Petitioner argues that the State Court erred in holding that the lands in question here are "open and unclaimed" within the meaning of the Treaty of 1855. It contends that the lands had lost their "open and unclaimed" character when they were included in a National Forest.

To determine the meaning of the controversial treaty language, the State Court examined the statements made to the Indians during the negotiations leading up to the conclusion of the Treaty of 1855. In interpreting the treaty in the light of the explanations furnished to the Indians by the Federal negotiators, the State Court correctly applied the rule laid down by this Court in *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899):

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States: and that the treaty must therefore be construed, not according to the technical meaning of its words to

learned lawyers, but in the sense in which they would naturally be understood by the Indians.[1]

In the instant case, the State Court pointed out, the chief negotiator for the United States at the 1855 treaty council had told the Indians on two successive occasions that they would be allowed to hunt "on land not occupied by the whites" or "on any of the lands not occupied by settlers." (R. 23) From these statements the Court correctly concluded that the terms "open and unclaimed land" must be interpreted to include all lands "not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership" (R. 24). National Forest lands are thus clearly "open and unclaimed."

Cases cited by Petitioner in opposition to the State Court's conclusion as to the meaning of "open and unclaimed land" stand merely for the proposition that reserved Federal lands are not open to general exploitation by the public. They have no application to the use of the phrase in an Indian treaty. Clearly, treaty language just like statutory language, "must be viewed in [its] setting." *United States* v. *American Trucking Associations*, 310 U. S. 534, 538 (1940).

Petitioner contends further that whatever hunting rights may have been reserved to the Nez Perce Indians in 1855, they were subject to certain inherent limitations which have caused them to expire long since. In that context it relies on the decision of this Court in the case of *Ward* v. *Race Horse*, 163 U. S. 504 (1896).

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[1] This rule has been reaffirmed most recently in *Choctaw Nation* v. *United States*, 318 U. S. 423 (1943), where the Court pointed out that the meaning of treaties is ascertained by an examination of the history of the treaty and the negotiations and then observed: "Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed so far as possible, in the sense in which the Indians understood them, and 'in the spirit which generously recognizes the full obligations of this nation to protect the interests of a dependent people.'" At p. 432.

The case of *Ward* v. *Race Horse* involved the hunting rights of the Bannock Indians under the Fort Bridger Treaty of 1868, 15 Stat. 673. As the State Court points out (R. 20), the Court failed in that case to resort to the minutes made preceding the execution of the treaty. From the language of the treaty the Court deduced that the parties to it had anticipated the advance of civilization and had "never intended the [hunting] right to be continuing." He concluded therefrom that the right was "temporary and precarious" and expired under its own terms upon the admission of Wyoming into the Union.

Whether or not the underlying assumptions of *Ward* v. *Race Horse* are considered justified, it is clear that they are at variance with the facts in this case.[2] As indicated before, the State Court, correctly applying the rule of *Jones* v. *Meehan, supra,* carefully examined the record of the treaty negotiations. It did not find any indication in that record that any of the reserved rights were temporary and precarious. On the contrary, it found that one of the Indians had emphasized the perpetual character of the arrangement by stating his understanding of the Treaty in the following terms (R. 23):

> "I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking."

The case of *New York ex rel. Kennedy* v. *Becker,* 241 U. S. 556 (1916) is similarly inapplicable to the situation in the instant case. As this Court observed in its decision in that case, the Indian fishing right in question there had been granted subject to the inherent limitation that "the existence of the sovereignty of the state was well

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[2] The State Court suggests that the doctrine of *Ward* v. *Race Horse* was repudiated in *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919) (R. 23). However, as the *Race Horse* case is clearly distinguished, that observation is not essential to its decision.

understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." (p. 563) The Indians involved in the *Kennedy* v. *Becker* case had been aware of the existence of and had dealt with New York long before the United States came into being.

By contrast, the Nez Perce Indians of 1855 had never known any sovereignty but that of the United States. Idaho was not to become a territory for another eight years and was not to become a state for another thirty-five years. As a matter of fact, at the time the Nez Perces concluded the Treaty of 1855, the States of Texas and California were the only sovereign states west of Missouri.

It is thus clear that the Court correctly found that the Nez Perce Treaty of 1855 was not burdened with the inherent limitations on hunting and fishing rights which this Court determined to exist in the treaties under consideration in *Ward* v. *Race Horse* and *Kennedy* v. *Becker* and concluded correctly that the Nez Perces' right to hunt on open and unclaimed land has subsisted to this very day.

The rights claimed by respondent and upheld by the State Court is the right to hunt outside the reservation but within the area of Nez Perce aboriginal occupancy, ceded to the United States under Article I of the Treaty of 1855, if such land is "open and unclaimed" at the time the right is exercised. Petitioner, however, tries to suggest that the State Court upheld the right of the Nez Perces to hunt on any land, both inside and outside the area of Nez Perce aboriginal occupancy, if it was open and unclaimed in 1855.

That Petitioner miscontrues the decision of the State Court is quite evident. The Court held explicitly that the right of the Nez Perces is a right to hunt on the lands *which they had ceded to the federal government* (R. 29). Nor is it a right extending to all lands open and unclaimed at the time of the Treaty. As the State Court pointed out, the right does not extend to lands "settled and occupied

by the whites under possessory rights or otherwise appropriated to private ownership" (R. 24). Yet, prior to the effective date of the Treaty, no private rights of white settlers could have existed on Nez Perce land. See *Johnson* v. *McIntosh*, 8 Wheat, 543 (1823). The privately-owned lands of which the Court spoke were thus necessarily lands acquired subsequent to the Treaty. It is thus clear that the holding of the Court meant that the right to hunt applies only to those lands which are open and unclaimed at the time the right is exercised.

**II. The State Court Held Correctly That the Nez Perces' Hunting Right Under the Treaty of 1855 Has Subsisted to the Present Time.**

The second basic question to be considered is whether the clearly defined hunting right of the Nez Perces established by the Treaty of 1855, was abrogated by subsequent treaties or enactments.

Subsequent to the Treaty of 1855, the United States entered into two further agreements with the Nez Perce Indians, the Treaty of 1863, 14 Stat. 647, and the Agreement of 1893, 28 Stat. 327. As the State Court correctly points out these agreements did not extinguish the right of hunting on open and unclaimed land and, in fact, "expressly [continue] in full force and effect all provisions of the Treaty of 1855 not abrogated or specifically changed or . . . not inconsistent with [their] provisions."[8] (R. 17).

Petitioner argues that the hunting rights of the Nez Perces under the Treaty of 1855, though not altered by subsequent treaty, were changed by subsequent statutes. It contends further that the State Court erroneously held that Congress had no power to abrogate treaties. An examination of the decision reveals, however, that the Court did not question the power of Congress in that

[8] Treaty of 1863, Article VIII; Agreement of 1893, Article XI.

regard. It decided that Congress had not exercised that power.

With respect to this part of the case, Petitioner relies, in the first place, on the act admitting the State of Idaho into the Union, 26 Stat. 215 (1890). Its contention was correctly rejected by the State Court which observed that "[n]owhere within the provisions of the Admission Act . . . is there any expressed intention to abrogate or extinguish any of the provisions of the Treaty of 1855 nor to relieve the State of the obligations thereof." (R. 18). Repeal by implication, the Court pointed out, is not favored. See *United States* v. *Payne*, 264 U. S. 446 (1924). This is particularly true where, as here, "the Agreement of 1893, subsequent to statehood, expressly provided that the provisions of all former treaties with the Nez Perce Indians which were not inconsistent with the Agreement of 1893 were continued in full force and effect" (R. 19). No reference is contained in that agreement as to any possible termination of rights as a result of the Admission Act of 1890.[4]

Petitioner contends further that the rights of the Nez Perce Indians on National Forest lands were extinguished by the various laws for the establishment and administration of National Forests. The sections of the United States Code cited by Petitioner, however, are concerned with general problems of administration and contain no references to Indian treaty rights. Nor has Petitioner shown that Congress, in enacting the laws in question, had any thought of modifying existing Indian treaty rights. As was stated above, and as this Court has emphasized, repeal by implication is not favored. Petitioner's contention is thus clearly without merit.

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[4] As indicated above, this Court held in *Ward* v. *Race Horse*, *supra* that the Admission Act of Wyoming terminated an Indian treaty right. However, that was true only because the right in question was "temporary and precarious" and expired under its own terms. The Admission Act could effect the treaty right only because of that inherent limitation, being, under the Court's construction, the condition subsequent envisaged by the treaty.

Petitioner seems also to suggest that as to Indians who received individual allotments, tribal hunting rights were terminated by the General Allotment Act of 1887, 24 Stat. 388. In support of that contention it cites *In re Heff*, 197 U. S. 488 (1905). Petitioner has apparently overlooked the fact that *In re Heff* was expressly overruled in *United States* v. *Nice*, 241 U. S. 591 (1916) in which this Court held that "tribal relation and the wardship of the Indians were not to be disturbed by the allotments and trust patents."

The final question to be resolved is whether the State conservation statute under consideration here can operate to cut off an Indian treaty right. The Court's answer is put in terms of a well-accepted principle of constitutional law: "[T]he federal government is paramount and supreme within the scope of powers conferred upon it by the Constitution and it follows that a state must exercise its police power subject to constitutional limitations, if any; the statute of any state enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand." (R. 25).[5]

In pressing its contention that the state of Idaho had the power to abrogate the Nez Perce treaty right, Petitioner relies heavily on the case of *Tulee* v. *Washington*, 315 U. S. 681 (1942). That case involved the question whether an Indian who had a fishing right under a treaty had to comply with the licensing requirement of the State of Washington before exercising that right. The decision

[5] In *State* v. *McConville*, 65 Idaho 46, 139 P. 2d 485 (1943), the Supreme Court of Idaho, in upholding an Indian's fishing right, had quoted from the decision of this Court in *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343 (1939): "'Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations.'"

of this Court was that he did not have to comply with the licensing requirement as it "cannot be reconciled with a fair construction of the treaty."

Petitioner points out that this Court further observed in the *Tulee* case that "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." A footnote to this remark cites *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916) and *United States* v. *Winans*, 198 U. S. 384 (1905).

It is clear that the above observation was not necessary for the decision in the *Tulee* case. The Supreme Court of Idaho, therefore, correctly characterized it as dictum (R. 26). The Court pointed out further that it did not challenge the power of the State to make certain regulations concerning the manner in which Indians could exercise their treaty rights. The State's power "to enact reasonable laws for the conservation of wildlife . . . has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized." (R. 26-27)

The fishing right under consideration in the *Tulee* case was a right to fish "at all usual and accustomed places, *in common with citizens of the Territory*" [emphasis supplied]. The very terms of the treaty thus impose a limitation on the fishing right. The right is to be shared with non-Indians. From this it could be deduced that where there is danger that the rights of either party may be destroyed by the other, the state may enact regulatory measures to protect them. For example, as this Court points out in *United States* v. *Winans*, *supra* with reference to the same treaty provision, neither party may place a fish wheel at a usual and accustomed place so as to

exclude the other party entirely. As the State would thus have the power to prevent Indians from fishing with fish wheels, it might have the power to take other, similar steps if they were designed to protect the fishing rights of non-Indians as guaranteed by the Treaty.

By contrast, the right to hunt, which is involved in this case, was not granted "in common with citizens of the Territory." This distinction between hunting and fishing appears to be a reasonable one if one considers that fishing is an important method of food-gathering for non-Indians as well as Indians. Hunting, on the other hand, was a primary method of food-gathering for Indians only. It still is today, to a large extent, a major source of food for the Nez Perce Indians. (See R. 27). The reason for the distinction in the treaty between the treatment accorded fishing and that accorded hunting is thus clear.

Conceivably the State could make certain regulations affecting the Indians' manner of hunting. It could, perhaps, prohibit the use of devices not envisaged at the time of the Treaty of 1855, such as spotlights, if the prohibition applies equally to non-Indians. What it can certainly not do is destroy the Indians' treaty right for certain months of the year. Limiting Respondent to hunt only during open season, the State Court pointed out "would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished would for all practical purposes be extinguished." That result "was never intended under the broad, fair and liberal construction of the treaty" (R. 28). This last conclusion is the essence of the State Court's decision. It is in basic accord with this Court's decisions in *United States* v. *Winans*, 198 U. S. 371 (1905), *Seufert Bros. Co.* v. *United States*, 249 U. S. 194 (1919), and *Tulee* v. *Washington*, 315 U. S. 681 (1942).

## CONCLUSION

As the decision below is correct, it is respectfully submitted that the petition be denied.

Respectfully submitted,

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NO. 552

FILED

MAR 15 1954

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1953

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STATE OF IDAHO, *Petitioner*

vs.

DAVID ARTHUR

---

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

---

## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

---

We believe it unnecessary again to summarize the Record which is now before this Honorable Court, since that is done fully in our opening brief.

We file this Reply Brief, not because Respondent's Brief answers the questions submitted, nor yet the opening Brief of Petitioner herein (for it does not), but because we believe it appropriate and indeed our duty to keep the briefing record straight. There are so many misstatements of fact and unsupported conclusions in the adversary brief that we believe it should not go unchallenged.

## ARGUMENT

As to the questions presented to the state court, the paragraph, "Questions Presented", in Respondent's Brief, page 2, falls so far short of the Record, even the state court's opinion, that we refer this Honorable Court to our Petition for the Writ, pages 15 to 34.

The state court, contrary to Respondent's statement on page 3 of his brief, had before it more than two basic questions. A statement to the contrary does not alter the Record facts. That the numerous and successive Acts of Congress which are cited and summarized in our opening Brief together with appropriate decisions are nowhere even mentioned by the state court, although twice presented to them, speaks in no uncertain language. When Respondent states (his Brief, page 9) that "it (the state court) decided that Congress had not exercised that power" (to legislate in conflict with the treaty provisions) he asserts that which is outstandingly conspicuous by its absence. In fact, he also has not discussed either the Forest laws, the Regulations, or the decisions.

Of the provisions of the *Idaho Admission Act*, 26 *Stat.* 215, he omits the unquestionable truth that both the Organic Acts which respectively created the Territories of Idaho and Wyoming (*Idaho*, 12 Stat. 808, *Wyoming*, 15 Stat. 178) and the Acts which admitted those Territories to statehood (*Idaho*, 26 Stat. 215, *Wyoming*, 26 Stat. 222) are substantially and indeed almost identically the same. Each Organic Act recognized and forbade the infringement upon treaty and other rights of the Indian people (Idaho, Secs. 1 and 17); on the other hand, both Admission Acts were entirely silent concerning any of

those matters. As this Court said in *Ward v. Race Horse*, 163 *U.S.* 504:

> "The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians is given increased significance by the fact that Congress in creating the territory expressly reserved such rights. * * * * * To refer to the limitation contained in the territorial act and disregard the terms of the enabling act would be to disregard and obliterate the express will of Congress."

Yet Respondent has attempted doing just that.

The "compiler's note" following Section 1 of the Organic Act of the Territory of Idaho, in 1863, which is found in *Idaho Code, Vol.* 1, *pages* 28-30, treats at length of Oregon, Washington, Idaho and Wyoming, is very interesting and illuminating, and contains all the proper citations of the Congressional Acts. The Idaho court waved the *Race Horse* case aside by saying that it had been "rejected" and "repudiated" by this Court: we are still waiting for somebody to point out to us where and when that occurred. While we do not "rely principally" upon it, as now assumptively stated by Respondent although the contrary is definitely shown in our opening brief, p. 42, it seems quite plainly to be an established precedent of decision in this Honorable Court, and is important because it dealt specifically with the killing of game out of the season permitted by the law of the State of Wyoming (70 Fed. 598) which is the very thing that occurred in the present case. Moreover, Respondent again misstates (Brief, page 11) that the footnotes which are a part of the decision of this Court in the *Tulee* case, cite only the

*Kennedy-Becker* and the *Winans* cases. There cited are also the *Race Horse, Geer* and *Patsone* cases (all the foregoing are cited in our opening brief) in support of this Court's holding (*not* "remark") that "the treaty leaves the state with powers to impose on Indians equally with all others restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish". That is precisely what the duly constituted authorities of Idaho are trying to do for the conservation of Idaho game. The case is found in 315 *U.S.* 681, 62 *Sup. Ct.* 862 and 86 *L.Ed.* 1115.

Respondent, still following in the footsteps of the Idaho court, is now attempting to "repudiate" the *Tulee* decision by calling it "dictum." When one looks at the decision as reported in 86 *L.Ed.* 1115, one finds the briefs in this Court summarized, and also finds by merely casual reading that the propositions which this Honorable Court considered and answered were very expressly and fully presented by counsel then appearing, especially by counsel who presently appears for Respondent. We believe that we have already cited in our opening Brief sufficient authority to do away with Respondent's insistence of "dictum," but there are so many other decisions that we cannot refrain from now calling attention to an exemplary group.

In Vermont the court stated:

> "The propositions of law there stated by the court were necessarily involved in the determination of the case, and consequently they are of the doctrine of the case for which the decision is authority."

Derosia v. Firland,
76 Atl. 153, 156.

The Georgia court in more recent years rendered a decision replete with *many* authorities:

Dooly v. Gates,
22 S.E.2d 730, 734.

Further, when there are a number of questions submitted, a ruling on any of which would dispose of the case, all may be considered and determined and "neither holding is dictum."

Parsons v. Federal Realty Corp. (Fla.),
143 So. 912, 920.

Armstrong v. Armstrong, (Cal.),
193 P.2d 495, 497-498.

Jones v. Mutual Creamery Co. (Utah),
17 P.2d 256, 258.

Woodward v. Pacific Fruit &
Produce Co., (Ore.),
106 P.2d 1043, 1045.

Under similar circumstances Wisconsin held that such holdings and decisions are not dictum but are a judicial act thereafter to be recognized as a binding decision.

In Re Wehr's Will,
18 N.W.2d 709, 714.

Long ago the Missouri court held that in such a case

the court may proceed to determine the points which the record presents, that this "is the most satisfactory to all paries concerned" and is not dictum.

> Kane v. McCown,
> 55 Mo. 181, 199.

In reviewing a California case of recent date, this court, in answer to the traditional and not infrequent attempt to confess and avoid precedent by a resort to alleged "dictum", said:

> "This part of the opinion of the court was its answer to appellant's insistence. * * * * What the court said as to this was a statement of the ground of its decision."

For expressly that reason it was held *not* dictum.

This would seem to apply most aptly to Respondent's present insistence that this court's answer to the disputed propositions of counsel in the *Tulee* case was dictum.

> Six Companies of California
> v. Joint Highway District,
> 311 U.S. 180,
> 85 L.Ed. 114.

The adversary brief, page 10, complains that we have apparently overlooked the fact that *In Re Heff* "was expressly overruled" in *United States v. Nice,* 241 *U.S.* 591. Again, Respondent is mistaken, and since his brief takes the liberty to attempt stating facts *dehors* the Record and thus make wholly unsupported assertions, we beg leave to exercise the privilege of correcting such statements. It was not "overlooked." The compositor of this brief has dealt in numerous ways with Indian treaties and federal law

throughout Idaho for the last 40 years, and for more than eight years, 1914-1922, devoted a large portion of his time and efforts to the enforcement of federal law. As a sample of credentials and in support of this statement, we call attention to the personnel of counsel in a few cases:

U. S. v. Nez Perce County,
267 Fed. 495;

Skeem, et al., v. U. S.,
273 Fed. 93;

Chicago M. & St. P. Ry. Co. of Idaho v. U.S.,
218 Fed. 288;

Sol Louie v. U.S.,
274 Fed. 47;

Vane v. U.S.,
254 Fed. 28 *and* 32.

He certainly knew that the federal courts had jurisdiction of violations of the Indian liquor laws, but he also knew that the *Nice* case dealt *only* with the sale of liquor, resulted in part from "many later enactments" following the Dawes Act; and it surely did not overrule or dispute the statement of historic facts and existing decisions of this court contained in the *Heff* case. Moreover, while the *Heff* case was quoted in the Idaho decision, *State v. Lott,* 21 *Idaho* 646, and for that reason pointed out by Petitioner, a reading of that case discloses readily that the *Heff* case was not at all necessary to support the decision. The net result of a consideration of all three of these cases is, that *both* the state and federal courts had jurisdiction

in matters arising under liquor laws, *after* the Nez Perce Reservation ceased to exist and the allotment to the individual Indians had been made. That, we submit, is cold comfort for Respondent in the instant case. See also Idaho Constitution, Art. 21, Sec. 19, ratified and confirmed by Congress, Admission Act, Sec. 1. Indian title to lands here considered was "extinguished" many years ago.

Continuing briefly, Petitioner said nothing about the State of Idaho *abrogating* a Nez Perce Treaty. Rather, if condensed into one question, as far as is possible, do the Nez Perce treaties and agreements, when viewed in the light of congressional enactments since 1855, the great change of conditions and status since 1855, Idaho's statehood, and the decisions of this Court from the beginning to the *Tulee* case in 1942, now *inhibit* the state's sovereign power to *regulate* the hunting and killing of game within its borders? Regulation is one thing, prohibition is something very different. Stated succinctly, a *license* to hunt creates a right to be exercised, the related provisions of law *regulate* its exercise. A hunting license is a franchise conferred by governmental authority to perform acts which, without the license, would be illegal; but, however the right to hunt is acquired, it can be exercised only in accordance with the substantive provisions of the related law governing times, places, bag limits and the like.

> 38 C.J.S., Game,
> Sec. 15 on page 19.

Herein we ultimately reach the seasonal regulations.

We are told (Brief, page 12) that hunting "still is today, to a large extent, a major source of food for the

Nez Perce Indians." Again, that is so far apart from the real facts, not to mention the Record, that it seems hardly necessary to answer it. To support it, one would have to go farther and show that the farms, ranches, stock-raising, educational facilities, adoption of vocations professional and otherwise, which have been owned, used and enjoyed by generation after generation of the Nez Perce Indians for 60 years, are so inconsequential as to be negligible. According to Respondent, the Nez Perce are still "unlettered" nomads. With that, we, from rather intimate knowledge, beg leave to differ.

Concerning interpreters in 1855: there was not one, but two. *Kappler, Vol II, page 706.* Respondents Brief, page 4, overlooked the facts. A reading of the record of proceedings in the Long Council reveals that one of the Nez Perce people there present made it known that they were highly pleased with the services of one of those interpreters *because he knew their language.* When one turns to the Blackfeet Treaty, to which the Nez Perces were parties, one finds that same interpreter, and again, another interpreter, *both* for the Nez Perces. *II Kappler, page 740.* Furthermore, the authentic record of the Long Council proceedings leaves no room for accusation of "technical" trickery.

Finally the state court (Brief, page 7) was speaking of land in 1855, not 1953. Moreover, the Nez Perce Indians lived first in the Territory of Oregon, then in Washington, before the 1855 Treaty was drawn. We have already pointed that out by reference to the "compiler's note." The adversary brief is again either short on geographical and historic knowledge or conveniently forgetful. Further, in 1855, while Texas and California were states, Texas was *south,* not west, of Missouri. It is still there. Also,

Iowa, Missouri and Arkansas were sovereign states of long standing in 1855, Oregon Territory was created in 1848, and in 1853 Washington Territory was created from a part of Oregon and included the whole of what is now Idaho. Assuredly, the whites could have, had and were settled and still settling on, holding, governing and controlling those lands before there were *any* treaties. The Nez Perces and other Indians in those Territories can hardly be assumed to have been so naively ignorant that they did not know at least that, as well as the existence of territorial government in conjunction with the federal government: and that was *before* there was *any* reservation. That is what brought about reservations. A reading of the record of the Long Council discussions and proceedings would seem to make this self-evident.

Incidentally, *U.S. v. Payne* says nothing about "implication" (Brief, P. 9). Importantly, the *Tulee* decision leaves nothing to "implication". It is couched in forthright, simple English.

Respectfully submitted,

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